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OF

## THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

## THE HIGH COURT OF JUSTICE.

1899.

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OF

# THE COURT OF APPEAL.

1899.

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# CASES

DETERMINED BY THE

# PROBATE DIVORCE AND ADMIRALTY DIVISION

OF THE

# HIGH COURT OF JUSTICE

AND BY THE

# COURT OF APPEAL

ON APPEAL FROM THAT DIVISION

AND BY THE

# ECCLESIASTICAL COURTS.

1898. 1899.

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[IN THE COURT OF APPEAL.]

C. A.
1898
*Nov.* 7, 8.

## LA BOURGOGNE.

*Admiralty—Practice—Jurisdiction—Service of Writ—Foreign Corporation carrying on Business in England—Agent—Clerk—Rules of the Supreme Court*, 1883, *Order* IX., *r.* 8.

The defendants, a French company, owners of several lines of steamers, including one trading between French and English ports, and having their principal place of business in Paris, leased and paid the rent of an office in London where applications for freight and passage could be made to the company's agent. They agreed with the agent to be chargeable for income tax, to be liable for legal expenses, and to pay for advertisements, printing, postage, and telegrams; the agent to pay the staff, to bear the cost of heating, lighting, and furnishing the office, and to be remunerated by a guaranteed minimum commission on freight and passage-money. The agent acted for two other companies whose names were exhibited on the windows of the office as well as that of the defendants:—

*Held*, by the Court of Appeal (A. L. Smith and Collins L.JJ.), affirming the decision of the President (Sir F. H. Jeune), that the defendants were

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carrying on business in this country in such a way as to be resident within the jurisdiction, so that service, by the plaintiffs on the agent at the office in London, of a writ in an Admiralty action in personam for damage by collision on the high seas, was good service on the defendants within the meaning of Order IX., r. 8, of the Rules of the Supreme Court, 1883.

APPEAL against the refusal of the President (Sir F. H. Jeune) to set aside the service of a writ.

The question was whether the defendants, a foreign corporation, were carrying on business within the jurisdiction in such a way as to be liable to be served with process in the same manner as an English corporation aggregate under Order IX., r. 8. (1)

The facts were shortly that—

On July 4, 1898, a collision occurred on the high seas between the British sailing vessel *Cromartyshire* and the French mail steam-vessel *La Bourgogne*, and as a result of the collision the steam-vessel sank.

On July 7 the plaintiffs, Thomas Law & Co. of Glasgow, owners of the *Cromartyshire*, commenced an action in personam against the defendants, La Compagnie Générale Transatlantique, owners of *La Bourgogne*, claiming compensation for damages arising out of the collision.

On July 21 the writ was served on M. Paul Fanet, a representative of the defendants, at 36, Leadenhall Street, in the City of London.

The defendants entered a conditional appearance, and on July 27 moved before the President to set aside the service of the writ.

From the affidavits filed in support of the motion, the cross-examination of M. Fanet on his affidavit, and the correspondence between him and the defendants, it appeared that the Compagnie Générale Transatlantique is a French company formed under French law with its head office at 6 Rue Auber,

(1) Rules of the Supreme Court, 1883, Order IX., r. 8: "In the absence of any statutory provision regulating service of process, every writ of summons issued against a corporation aggregate may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of such corporation. . . ."

Paris, in the Republic of France; that the company owns a fleet of mail steamers, of which the steamship *La Bourgogne* was one, carrying cargo, passengers, and mails between Havre and New York under contract with the French Government; that the company also owns steamers trading between Mediterranean and African and other ports; that the trade done by the company's steamers with the United Kingdom is of a limited character, consisting of three steamers a week carrying passengers and cargo between Bordeaux, St. Nazaire, La Pallice, and Newhaven, and a bi-monthly service between the same ports, Nantes, and Liverpool; that M. Fanet has the title of "agent général" on account of being in charge of more than one agency, namely, London and Liverpool; that the company leases and pays the rent of the office in Leadenhall Street, London, which is larger than M. Fanet would himself require; that the company is chargeable for income tax on the profits (if any) of the business in England; that there is no lease of the office in Chapel Street, Liverpool, M. Fanet occupying it on a yearly tenancy, the rent being refunded by the company to him; that M. Fanet employs and pays the staff; that his duties mainly consist in securing freight and passage engagements, in collecting freight payable in England and transmitting it to the company, and in forwarding and delivering goods carried by the company's steamers; that the company remunerate him by commission on freights engaged; that he pays dock and pilotage dues, and supplies the masters of the vessels, if necessary, with money; that the company reimburse him these expenses together with the cost of telegrams, postages, advertisements, printing, and legal expenses; that he does not devote his whole time to the business of the company, but does other business on his own account as a shipping and forwarding agent; that the name of the company is displayed on the windows of the office in Leadenhall Street without qualification, but the names of two other companies for which he acts as agent are displayed upon the same windows and on the brass plate at the entrance, and on all business-cards, letter-paper, &c.; and that the defendant company's name is there qualified by the words "Paul Fanet, agent," or "London

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Agency, Paul Fanet," whilst across the entrance-door to the office two brass plates bear his name only.

On these facts it was contended on behalf of the defendants: that they were a foreign corporation, not carrying on business within the jurisdiction; and that the writ was not served upon an officer or clerk of the corporation as required by the rule. On behalf of the plaintiffs it was contended that M. Fanet was the manager of the business carried on by the defendants here, and, therefore, that he was properly served.

In addition to the cases mentioned in the judgment of the President, the following were cited in argument: *Sulley* v. *Attorney-General* (1); *Grant* v. *Anderson* (2); *Golding* v. *La Sainte Union, &c.* (3); *San Paulo (Brazilian) Railway* v. *Carter* (4); *Palmer* v. *Goulds & Co.* (5)

On August 9 the President (Sir F. H. Jeune) dismissed the motion with costs, on the ground that the business of the defendant company was carried on at 36, Leadenhall Street, and that service on M. Fanet was good service on the company. In the course of a considered judgment the learned judge said:—

The question to be decided is whether a good service has been effected under Order IX., r. 8, and that turns on the point whether this company is carrying on business in England as well as in France, and perhaps elsewhere. It was not disputed before me, nor could it be disputed successfully that the order in question is applicable in the case of a foreign company which carries on business in this country. The service was made on a M. Paul Fanet, and I do not think it can be denied that, if the company carries on business in England, he comes within the list of persons enumerated in the rule, because, although the language of the rule seems rather to have reference to municipal than to trading corporations, it is clear, especially having regard to the decision in the case of *Newby* v. *Van Oppen* (6), which was given with reference to identical words in s. 16 of the Common Law Procedure Act, 1852, that service on

(1) (1860) 5 H. & N. 711.
(2) [1892] 1 Q. B. 108.
(3) (1892) 67 L. T. 605.
(4) [1895] 1 Q. B. 580.
(5) W. N. (1884) 63.
(6) (1872) L. R. 7 Q. B. 293.

the head officer of the company's business in England must be considered sufficient. Therefore, all I have to decide is whether this French company carries on business in England, or, to be more precise, at 36 and 37, Leadenhall Street.

In a general and popular sense of the words, I think it is unquestionable that it does; and, apart from the construction to be placed on the language of rules, it is important to be assured that this is so, because no foreign company or foreign persons should be made subject to the jurisdiction of these Courts unless they have brought themselves within that jurisdiction by trading on its soil and under the protection of its laws. The office of the defendants at 36, Leadenhall Street is leasehold, the company being the lessees named in the lease, and, as part of an arrangement which they have with M. Fanet, paying the rent. In their official guide the company describe this office as one of their "bureaux," and they advertise that applications for freight and passage may be made "to the company's agent, Paul Fanet, 36 and 37, Leadenhall Street, and 23, Chapel Street, Liverpool." M. Fanet also pays the dock and pilotage dues on the vessels, and finds money for the captains when needful. But I think this matter turns on rather broader considerations. The company sends its ships to trade between French and English ports, and it is clear that any persons who wish to send goods or take passages by them can go to 36, Leadenhall Street, make a contract for such freight or passage with M. Fanet on behalf of the company, and pay to M. Fanet for the company whatever is due in respect of such contract. In other words, the company, in the only way in which it can by the hands of a representative, makes contracts and earns profits in England; and that, I think, presents the fact of a company carrying on business in England as a matter of law and a matter of common sense.

In cases before the Courts which have presented facts similar, though not identical, with those disclosed in this case, it has been held that that which is conducted at an office other than the head office of a company is not the business of the company, but the business of a firm or a person acting as agent of the company, and carrying on, not the business of the

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company, but their or his independent business of an agency. This view is not confined to foreign companies. To refer to a familiar example, it was long ago decided in *Minor* v. *London and North Western Ry. Co.* (1) that railway companies do not carry on business in Pickford's various offices, but that what is carried on there is the business of Pickford's as agents—agents, it may be, for the particular railway company amongst others, and perhaps for other companies also, but not as servants or managers of any one railway company.

In the case of *Walter Nutter & Co.* v. *Messageries Maritimes* (2) it was held that service on the London agent of the French company was not good service on them under Order IX., r. 8. But it appears to me that that case turned mainly on the consideration that M. Bertrand, the person served, did not occupy the position of a head officer; and indeed it would seem, as the judgment of A. L. Smith J. shews, that his duties were confined to giving information, answering inquiries, and forwarding goods, a firm of Gellatly, Hankey & Co. being the company's sub-agents for freight. A similar view was, I think, taken by the House of Lords in the case of *Grainger* v. *Gough* (3), in which it was held that a foreign merchant, who canvasses through agents in the United Kingdom for orders, does not exercise a trade in the United Kingdom within the meaning of the Income Tax Acts, the consideration upon which this decision mainly rested being, I think, that it was held in fact that the agents made no contract themselves, but only forwarded offers to their principal abroad, who himself then made, or refused to make, the contracts. But in this case the agent, as to the part of the company's business with which he is concerned, does all that the company could itself do in this country.

In a case recently decided before Gorell Barnes J., *The Princesse Clémentine* (4), the facts, which were similar in some respects to those in the present instance, were held to give rise to the above distinction. In that case it was sought to bring an action against a foreign shipping company by service on a

(1) (1856) 1 C. B. (N.S.) 325.
(2) (1885) 54 L. J. (Q.B.) 527.
(3) [1896] A. C. 325.
(4) [1897] P. 18.

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clerk at an office in London. The office was occupied and the rent paid by an English partnership of Barr, Moering & Co., and the clerk who was served was an employee of that partnership. Barr, Moering & Co. acted as agents for the Belgian company; and Gorell Barnes J., after stating that Barr, Moering & Co. held the offices in question, which were taken in their name and for which they paid rent, said: "In a popular sense, no doubt, the business of the defendant corporation is carried on by the corporation in England, but I do not think that this is so in the eye of the law. It seems to me that the business carried on in this country is that of an agency for the defendant corporation, and that this agency is conducted by the firm of Barr, Moering & Co. It follows, therefore, that the person upon whom service was made was the servant of that firm, and not the servant of the corporation."

There were several facts upon which it was argued before me that M. Fanet was in the same position as Messrs. Barr, Moering & Co. It appeared from correspondence between him and the French company that before September, 1895, the company had had "direct agencies" in London and Liverpool, M. Fanet being their agent-general, but that after that date the agencies became "corresponding agencies," and that under the new arrangement, while the company paid the rent of the offices, legal expenses, and income tax chargeable to the company (a term of agreement which certainly pointed to the expectation of profits being made by the company in this country), and the cost of advertising, and supplied the company's printed forms, M. Fanet provided the other expenses of the office, including the salary of clerks, and received commission on freights and passages, with a minimum yearly guarantee of 18,000 francs, which might be drawn monthly. At the office in Leadenhall Street, M. Fanet not only acted as agent for the French company, but also for two other companies, and the names of these companies appear on brass plates at the office as well as that of the French company. But to my mind these facts are not sufficient to outweigh the broader considerations which arise in this case, namely, that the office is in law and in fact the office of the company, though M. Fanet may be

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permitted to carry on other business as well as theirs there, and that the business of the company is carried on there precisely in the same way as if some one undoubtedly an officer of the company and nothing else was in possession.

I do not think it necessary to refer further in detail to authorities, as every case must depend on its own facts; but I will say that the view I take with regard to the defendants is substantially the same view as was taken by Bacon V.-C. with regard to the defendants in the case of *Lhoneux, Limon & Co.* v. *Hong Kong and Shanghai Banking Corporation.* (1) In that case the defendants had an "agency" in London, and were indeed forbidden to establish a "branch"; but the Vice-Chancellor said: "They hire an office, write up their name, and, beyond all question, stamp upon themselves and their place of business here the assumption that here they carry on their business." I think that those words are applicable in the present case.

Nov. 7. On appeal:—

*Pyke, Q.C., Joseph Walton, Q.C.*, and *F. Laing*, for the appellants (defendants). The service was bad, as the two essential conditions have not been complied with which are required as the result of the decisions on Order IX., r. 8, and on s. 16 of the Common Law Procedure Act, 1852, which that rule replaced; for—assuming that the argument is no longer open that the rule does not apply to a foreign corporation at all, still—it is necessary, in the first place, that the business of the foreign corporation should be carried on here in such a way that the corporation is resident within the jurisdiction; and, secondly, that the service should be made at the place of business here of the corporation upon a person answering the description of officer or clerk, whose knowledge is the knowledge of the corporation.

As to the first point. The distinction between a business being carried on in this country by a foreign corporation, and a foreign corporation having an agency here, was pointed out by

(1) (1886) 33 Ch. D. 446.

Blackburn J. in *Newby* v. *Van Oppen*. (1) If a foreign company, says the learned judge (2), "merely employed an agent here, who made a contract for them," the company could not be properly served here. Therefore, the fact that M. Fanet makes contracts for the defendants is not sufficient to bring them within the jurisdiction, as the learned President in his judgment seems to imply. Again, Lord Coleridge in *Walter Nutter* v. *Messageries Maritimes* (3) said, "the mere fact of the company having an agent in this country is not sufficient to enable it to be sued here"; and the distinction as to a person acting as agent for a company and carrying on, not the business of the company, but his own independent business of an agency, was strongly brought out in respect of the business of Pickford in *Minor* v. *London and North Western Ry. Co.* (4) In *Haggin* v. *Comptoir d'Escompte de Paris* (5) Cotton L.J. says (6) that the question is whether the foreign corporation is resident in this country, and that "when the foreign corporation is substantially carrying on their business at an office in this country, it must be considered as resident here." The company, therefore, must itself carry on its business here, but the entire business of the defendants is directed and controlled in Paris, and there are some hundreds of agencies scattered over different parts of the world, including the agency attended to by M. Fanet in London and Liverpool. M. Fanet is carrying on his own business at 36, Leadenhall Street, as a general forwarding agent and shipbroker. As part of that business he acts for the defendants and for two other companies whose names are also on the office windows; but he does not carry on their business, for he does not insure the ships of the defendants, or engage the crews, or control the officers, or fix the dates of sailing, or settle the rates of freight, or the amount of the passage-money. It is true that, in the arrangement between M. Fanet and the defendants, the latter agree to become chargeable for income tax, if any; but that does not decide the question, as, under the special provisions of the

(1) L. R. 7 Q. B. 293.
(2) L. R. 7 Q. B. at p. 295.
(3) 54 L. J. (Q.B.) 527.
(4) 1 C. B. (N.S.) 325.
(5) (1889) 23 Q. B. D. 519.
(6) 23 Q. B. D. at p. 522.

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Income Tax Acts, a person may, through his factor, agent, or receiver, become chargeable in respect of the annual profits of a trade exercised here, although he is not resident in the United Kingdom: *Werle* v. *Colquhoun* (1), see the reference to this case in the judgment of Lord Watson in *Grainger* v. *Gough*. (2)

Secondly, M. Fanet is not, as the learned President has assumed, a "clerk" of the corporation within the meaning of the rule, for in *Mackereth* v. *Glasgow and South Western Ry. Co.* (3) Bramwell B. laid it down (4) that such words refer to "a principal clerk, like a town clerk in the case of a municipal corporation, or the secretary of a public company"; but the evidence shews that M. Fanet acts as agent, and does not devote his whole time to the service of the defendants. He is remunerated, not by salary, but by a commission on freight "calculated on the net share accruing to the company"—that is to say, in the case of through freights, on the proportion of freight due to the defendants for the sea-passage between, e.g., Newhaven and Havre. The staff at the office in Leadenhall Street are not the servants of the defendants, but are the servants of M. Fanet, engaged, paid, and dismissed by him. In *The Princesse Clémentine* (5) the facts were very similar to those in the present case, and though the agents in that case did not carry on any business of their own, but devoted the whole of their attention to the business of the defendant company, Gorell Barnes J. set the service of the writ aside on the ground that the business carried on in this country was that of an agency for the defendant corporation, and that the person upon whom service was made was the servant of the agents and not of the corporation. It is true that in that case the office was taken in the name of the agents and the rent paid by them; but the fact that, as part of the re-arrangement entered into between the defendants and M. Fanet in 1895, the office is leased by the company and M. Fanet is remunerated by a commission plus the rent and petty expenses, does not conclude the

(1) (1888) 20 Q. B. D. 753.
(2) [1896] A. C. 325, at p. 339.
(3) (1873) L. R. 8 Ex. 149.
(4) L. R. 8 Ex. 151.
(5) [1897] P. 18.

matter, for rent was paid in *Corbett* v. *General Steam Navigation Co.* (1) and in *Sheils* v. *Rait.* (2)

*Sir R. T. Reid, Q.C., Aspinall, Q.C.,* and *A. E. Nelson,* for the respondents (plaintiffs). The service was good, for the facts shew that the defendants carry on their business here in such a way as to be resident within the jurisdiction. They lease in their own name and pay the rent of the office in Leadenhall Street. Their name is on the window. They are chargeable for income tax on profits earned by the exercise of their trade in this country; they are liable for legal expenses, advertisements, postages, printing, telegrams; and they employ M. Fanet to carry on in their office that part of their business which they conduct through him in England. A company can only carry on its business by means of servants or agents. It is true that their principal place of business is in Paris; but the defendants can have two domicils: see per Lord St. Leonards in the *Carron Iron Co.* v. *McLaren.* (3)

Secondly, the service was effected on the manager of the business of the defendants in this country. It is not material that M. Fanet is called a "general agent"—that only means that he acts as the servant of the defendants in more than one place, namely, in London and Liverpool. The mode of paying M. Fanet by way of a guaranteed minimum commission instead of by a fixed salary does not alter the relationship, but is a matter of arrangement and convenience; nor does it affect the case that the defendants allow M. Fanet to carry on in their office the business of two other companies.

[A. L. SMITH L.J. Are the defendants resident in all the different places where they have agencies?]

That would be a question of fact to be determined in each case.

[Reference was made to *Erichsen* v. *Last* (4); Order XLVIII. A, rr. 1, 3; *Worcester City and County Banking Co.* v. *Firbank.* (5)]

*Pyke, Q.C.,* in reply.

(1) (1859) 4 H. & N. 482.
(2) (1849) 7 C. B. 116.
(3) (1855) 5 H. L. C. 416, at pp. 450–459.
(4) (1881) 8 Q. B. D. 414.
(5) [1894] 1 Q. B. 784.

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Nov. 8. A. L. SMITH L.J. The question is whether the defendant company, at the date when this writ was served, was carrying on business in this country under such circumstances as would enable it to be said that it was resident in this country. If so, it will be conceded that the head officer or manager of the business in this country was the proper person to be served with process in this country.

The defendant company is a foreign corporation; but it is too late to discuss the question whether Order IX., r. 8, only applies to English municipal corporations, because it has been held by authority binding upon this Court that it does apply to a foreign corporation. The case of *Newby* v. *Van Oppen* (1), decided in 1872, and followed by *Haggin* v. *Comptoir d'Escompte de Paris* (2), shew the law to be that if a foreign company carries on its business in this country in such a way as that it may be said to be resident here, then English process may be served upon it in the manner provided by the rule. If, however, this fact is not established in each case, then process cannot be served upon the foreign company here. Each case must depend upon its own facts, and the persons who wish to serve process must be able to prove that the foreign corporation is resident here before they will be entitled to serve the writ upon the manager of the company in this country. What are the facts here? The French company has a head office in Paris, but it carries on business in many parts of the globe. The business of the company is that of shipowners, who own or lease ships, or at any rate run ships for profit from France to different parts of the world. It appears that it has a line of mail steamers from Havre to New York, a line of steamers also from Mediterranean ports to Africa, and, what is important in this case, a line from French ports to Newhaven and back, and also to Liverpool and back; so that the French company is undoubtedly trading with this country. It was alleged that this line of steamers between France and Newhaven was in comparison smaller in regard to tonnage and the number of ships running than the other lines. This seems to me to be wholly immaterial. I

(1) L. R. 7 Q. B. 293. (2) 23 Q. B. D. 519.

do not think, as was contended by counsel for the plaintiffs, that if the defendant company had done nothing more than run a line of steamers from Havre to Newhaven and back, employing a broker here to arrange for the loading and unloading of the ships, and paying him a commission for so doing, that that would constitute carrying on business by the French company in this country so as to constitute residence within the jurisdiction. But there is a more important factor, which in my judgment is the governing fact in this case, which is that the defendant company has come to this country and taken a lease of premises in Leadenhall Street, and thereby has brought itself under contractual obligations with the landlord to carry out all covenants in the lease whatever they may be, and the payment of rent is undoubtedly one of them. When I have to determine the question whether the business carried on in Leadenhall Street is that of M. Fanet, a broker, or whether it is the business of the French company, I ask myself this question: For what purpose were those premises taken? Were they taken by the French company in order that M. Fanet might carry on his business there, or in order that it might carry on its own business there? To my mind, the answer is clear that these premises were taken in order that the French company might carry on its business there, and not in order that M. Fanet might carry on his business there. That being so, the next question to consider is the position of M. Fanet in the case. It is alleged that he is a shipbroker. Well, no doubt he is; but that would be a reason for putting M. Fanet in as manager of this French company's business in Leadenhall Street, where all the business is done in respect of loading or unloading the ships which come from Havre to Newhaven and go from Newhaven to Havre. Nobody but a shipbroker would understand the business which had to be done; and therefore it does not at all follow that, because M. Fanet is a shipbroker, he is managing his own business and not the business of the company.

In my view of the evidence, and it is always a question of fact, these premises were taken by the company for the purpose of carrying on, through M. Fanet its manager, its business in

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A. L. Smith L.J.

this country, although M. Fanet is also allowed to carry on business on his own behalf if he likes, and it seems that he does carry on the other agencies whose names appear on the door. The name of the French company is advertised on the door as being the company carrying on the business at 36, Leadenhall Street. There is also the name of M. Fanet as agent, and also the names of the other agencies; but that does not make M. Fanet any the less carrying on the business of the company. It seems to me, therefore, that when we have the fact that these premises were taken in Leadenhall Street by the French company for the purpose of carrying on its business of trading with this country, that it comes within the rule, that the French company is carrying on its business in this country in such circumstances as to make it resident within the jurisdiction. It is, however, said that this is negatived by other facts. What are these facts? It is alleged that certain payments are not made by the company in this country. I will first consider the payments which are made here. The cost of advertisements is paid. Advertisements for what? For advertising the business of the French company. Then there are legal expenses. Legal expenses for what? The legal expenses of the French company's business carried on in Leadenhall Street, and not of the other agencies which M. Fanet carries on. Then there is the cost of printed forms of the company—not the cost of any other forms which M. Fanet may have as regards the other agencies. Then there is income tax chargeable to the French company, that is income tax, if any, levied upon the French company's business carried on in this country. That also is paid by the French company, and not by M. Fanet. Postages and telegrams not refunded are also to be paid by the French company.

On the other hand, it is said that there are expenses which M. Fanet has to pay, such as the expense of the staff. The bargain between the parties is that, as M. Fanet was to have the right to carry on his own business in conjunction with the business of the company, he should find and pay the staff, and it is in evidence that he does pay the staff about 80*l.* per month. That is not inconsistent with his carrying on at these

premises the business of the French company. Then as regards the payment of commission to M. Fanet. The agreement is that for carrying on the business of the French company in Leadenhall Street he is to have a guaranteed commission up to a certain amount by way of a percentage on inward freight, a percentage on outward freight, and on passage-money, these commissions to be calculated on the net share accruing to the company. Whatever the meaning of that net share is, it seems to me that it is not the ordinary payment of an ordinary shipbroker. If I am wrong on that point, that does not do away with the true view of this transaction, which is that the company came over here and took premises within the jurisdiction for the purpose of carrying on its business, and it put in M. Fanet as manager on their own premises for the purpose of carrying on its business, though it may be in conjunction with his own business.

I am, therefore, of opinion that the learned President has come to the right conclusion in refusing to set aside the service of this writ, and in so holding I do not think I am in conflict with any reported case. I am aware of what two learned Law Lords have held in the case of the *Carron Iron Co.* v. *McLaren* (1), and also what Blackburn J. held in *Newby* v. *Van Oppen* (2) as to what he thought were findings of fact; but findings of fact are not binding upon us, and when it is said that this case is similar to *Corbett* v. *General Steam Navigation Co.* (3), I will only point out that in that case what the General Steam Navigation Company did was to take part of the broker's own premises for the purpose of the broker carrying on the business which he did carry on for the company. That is not this case.

In my opinion, upon the facts of this case the learned President is right. The company is carrying on business here in such a way as to constitute residence in this country; and, therefore, the proper person to be served under the rule is the person managing the business—the chief officer—that is, M. Fanet.

(1) 5 H. L. C. 416. (2) L. R. 7 Q. B. 293.
(3) 4 H. & N. 482.

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COLLINS L.J. I am of the same opinion. It is not necessary to go again in detail through the facts. The question seems to me in the last resort to be one of fact, and, though the balance is a very even one, still when I find that the learned judge of the Court below has accurately stated the principles of law applicable to the case, and, after taking into consideration all the facts material to the case, has properly applied the law and come to a conclusion upon the facts, I should be very loth, unless the evidence was very strong the other way, to differ from him upon a question of fact.

Order IX., r. 8, is a reproduction practically, I think, of s. 16 of the Common Law Procedure Act, 1852, and primâ facie is not applicable to a foreign corporation. It requires, in my judgment, some straining of the words to make it applicable; but it has been held to be so, and we must start from that basis. In order to understand how the decisions—of which there are several—on the rule are to be applied, it is necessary to examine the origin of the principle that a foreign corporation can be reached by English process, for when it was sought to bring a foreign corporation within the jurisdiction, the proposition was met at once by the primâ facie presumption that a foreign company had to be reached, if at all, by some process or some machinery for serving process out of the jurisdiction. Then arose for discussion those cases in which a corporation—which has one body, one entity—carried on business in more than one place, in such a way as to admit of the contention that, though one and indivisible, it nevertheless might have more than one domicil. That was the question discussed in the case of the *Carron Iron Co.* v. *McLaren* (1), and it is clear now that a corporation may have more than one domicil. In the case of a foreign corporation, it is necessary to get at the question of its domicil by reference to the mode and the place in which it carries on its business. That is the origin of the discussion as to residence; and the result is that, if a foreign corporation is found to be actually carrying on business in this country at a fixed place, you are then able to apply to it—not the machinery for

(1) 5 H. L. C. 416.

serving process out of the jurisdiction, but—machinery for serving process within the jurisdiction. The only thing in which the assistance of legislation is needful is the power to serve upon an individual something meant for a corporation. That is the history of the matter.

Now, is this corporation carrying on business, not merely in the waters of England, but carrying on business at a fixed place, so as to entitle the plaintiffs to say, "This is a corporation resident in England, and I can, therefore, adopt the process of serving persons within the jurisdiction"? That involves a nice question of fact. It seems to me that all the business in fact done here might have been done in such a way as either to make it the business of the company, or so as to make it merely the business of the agent for the company. The business is necessarily, whoever it is done by, the same. How has the company dealt with the matter? It has chosen to take premises itself. Whose office is it? It is the office of the company. Whose trade is carried on there? Unquestionably the trade of the company. If the company had chosen to send some one over from France skilled in the business of securing freights, and had chosen to take an office for him and pay him a fixed salary, computed by reference to the necessary expenses of the office and reasonable remuneration to him, and had said to him, "We will give you a fixed salary, out of which you must pay the expenses of the office," could it have been then contended that it was not their business which that person conducted in their office in London? Would they not have brought themselves within the principles I have laid down—of a corporation carrying on its business in a fixed place in England? Whichever view is adopted, you must have a person capable of carrying on a particular business, and carrying it on at a particular place. The defendants have chosen to make that place their own place, and they have chosen also to give the person they employ what is called a commission. It is a guaranteed minimum commission, and it appears that, in the circumstances of the case, there is very little hope of his getting anything other than the fixed salary called a minimum commission; but the arrangement seems reasonable. M. Fanet

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is a Frenchman, and, therefore, specially qualified for the particular business required of him. He is resident in London; he has the skill of a broker, and was therefore an instrument ready to their hand. Having got him, they chose—I suppose it suited their purpose better—to put him into their office, instead of merely relying upon his skill and ability to conduct their business in his own office. Instead, also, of carrying on their business in an office such as M. Fanet would have been able to afford, they have chosen to get—as M. Fanet points out—the benefit of the advertisement, by having, and paying for, a handsome office in a prominent street with their name in large letters on the windows.

I think the case involves a nice examination of all the facts, and inferences must be drawn from a number of facts adjusted together and contrasted; but, in my judgment, the true result is that this company may be said to be carrying on their own business on their own premises. This result is, I think, summarised with perfect propriety by the learned President when he says: "To my mind these facts are not sufficient to outweigh the broader considerations which arise in this case, namely, that the office is in law and in fact the office of the company, though M. Fanet may be permitted to carry on other business as well as theirs there, and that the business of the company is carried on there precisely in the same way as if some one undoubtedly an officer of the company and nothing else was in possession."

*Appeal dismissed.*

Solicitors for appellants (defendants): *Ince, Colt & Ince.*
Solicitors for respondents (plaintiffs): *Lowless & Co.*

T. L. M.

[IN THE CONSISTORY COURT OF PETERBOROUGH.]

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*July* 25.

## THE VICAR AND CHURCHWARDENS OF ST. NICHOLAS, LEICESTER, AND THE CORPORATION OF LEICESTER *v.* LANGTON AND OTHERS.

*Ecclesiastical Law—Faculty for Removal of Human Remains and Use of Strip of closed Churchyard for Widening of Public Highway—Joint Petition by Incumbent and Churchwardens and Highway Authority—Practical Necessity for proposed Works—Issue of Faculty to Incumbent and Churchwardens.*

Where it appeared that the widening of a public highway abutting on a churchyard of a parish church would be a benefit both to the congregation attending the church and to the public in general, and that in the opinion of the highway authority—a municipal corporation—it was practically necessary that the widening should be effected by including therein a strip of the churchyard closed for burials by Order in Council, a faculty was granted to the incumbent and churchwardens of the church authorizing the removal of human remains interred in the portion of the churchyard required for the widening and the setting back of the churchyard fence so as to throw such portion of the churchyard into the highway on the Ordinary being satisfied that an adequate consideration would be paid by the corporation in return for the rights sanctioned.

The corporation had joined in petitioning for the faculty, but was omitted from the grant, the Ordinary being of opinion that it was preferable that the grant should be made to individuals.

THIS was a cause of faculty instituted on behalf of the Rev. Edward Atkins the vicar, and Charles Bennion and Benjamin Watson the churchwardens, of the parish of St. Nicholas, Leicester, in the borough and county of Leicester and the diocese of Peterborough, and the mayor, aldermen, and burgesses of the borough of Leicester, for the purpose of obtaining a faculty sanctioning portions of the churchyard of the parish church of St. Nicholas, Leicester, shewn on a plan annexed to the petition for the faculty, being included in a proposed widening of the adjacent street called St. Nicholas Street, Leicester, on its northern side, and being used by the parishioners of St. Nicholas and others, as to one portion thereof as a public footpath, and as to the other portion thereof as a public road-

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way for horses, carriages, and other vehicles, "for such period only as the parishioners of the said parish may require to use the same for the purpose of access to and from the said church, subject nevertheless to the following condition, namely, that the said portion of the said churchyard should revert to and be inclosed as heretofore as part of the said churchyard if and when at any time hereafter the parishioners should cease to require the user thereof for the purposes aforesaid."

The petition alleged that St. Nicholas churchyard had long been disused as a burial ground, and was closed for burials by an Order in Council of October 19, 1855, and that no sale, conveyance, lease, or other dealing with the freehold estate or interest of the vicar in the portion of the churchyard proposed to be included in the widening of St. Nicholas Street was proposed to be effected, but that the leave and licence of the Court was sought to the improvement of the access from St. Nicholas Street to and from the said church, to certain desirable improvements in and about the curtilage of the vicarage of the said church, and to the increase by the corporation of the endowment of the living of St. Nicholas by an amount of 1000*l.* on certain terms and conditions which, subject to the sanction of the Court, had been agreed to between the corporation of Leicester and the other petitioners, and had been approved of by the vestry of the parish.

These terms and conditions provided for the due investment of the one thousand pounds proposed to be added to the endowment of the living of St. Nicholas; for the whole of the work in connection with the new carriage-way and footway in front of the churchyard being executed by and at the expense of the corporation; for the conversion of the portions of the churchyard included in the proposed widening into a footpath and carriage-way respectively, pending the duration of the leave and licence of the Court, with a stipulation that both footpath and carriage-way should be maintained by the corporation; for the construction by the corporation of a new churchyard fence abutting on the widened street with a new entrance gate; for the carrying out by the corporation of the improvements proposed in and about the curtilage of the vicarage, the pay-

ment to the vicar of 100*l.* towards the cost of additions and alterations to the vicarage, and to the vicar and churchwardens of all their costs and charges in connection with the negotiations, agreement, and application for the faculty; for restrictions on the height and mode of construction of certain buildings to be built in the vicinity of the vicarage and churchyard; and for the decent and reverent reinterment of all bones or remains disclosed in the course of the alterations.

An appearance in opposition to the grant of the faculty having been entered on behalf of Samuel Langton, of 9, St. Nicholas Square, Leicester, in the parish of St. Nicholas, Leicester, an objective allegation signed by him on May 12 last was brought in. Such objective allegation objected to the grant of any faculty to authorize the vicar and churchwardens of St. Nicholas, Leicester, to sell to the corporation of Leicester 185 square yards of land or thereabouts, part of the churchyard of St. Nicholas, Leicester, on the grounds that the widening of St. Nicholas Street, as proposed by the corporation, was not required for the convenience of the parishioners; that the open space of the churchyard ought not to be curtailed; and that the widening of St. Nicholas Street could be more effectively carried out on the south side thereof, and at less cost to the ratepayers.

The petitioners filed a responsive allegation signed by them on May 26 last, demurring to the allegation that they propounded or proposed to sell any portion of the churchyard, and denying in effect all the allegations in the objective allegation inconsistent with the petition.

On June 28 last the suit came on for hearing in the Consistory Court in St. Martin's Church, Leicester, before the Chancellor of the Diocese of Peterborough (George Holmes Blakesley, Esq.), when evidence, the result of which is stated in the judgment, was given in support of the petition by the vicar and one of the churchwardens of St. Nicholas, Leicester, and four other witnesses, and by five witnesses in opposition thereto.

July 9. The hearing was continued before the Chancellor, sitting by consent in Lincoln's Inn.

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*Arnold Statham*, for the petitioners. The Court has jurisdiction to decree the faculty asked for, and ought in its discretion to do so. There is a public necessity, according to the decision of the corporation of Leicester—the highway authority—for the widening of St. Nicholas Street being effected on the north side, and so as to include a strip of the churchyard; and this decision ought to be considered as conclusive on the merits of the scheme of the corporation over any others upheld by the opponents. If the faculty be granted, not only will a great public improvement be brought about, but the ecclesiastical interests of the parish will be advanced by access to the church being rendered more convenient by the improvements and advantages agreed to be given to the vicar and his successors, and by the street, when widened, being paved with wood. The present case is, therefore, clearly within the recent cases in which like faculties have been granted in the Consistory Courts of London, Chichester, Lincoln, Worcester (1), and Llandaff: *The Vicar and Churchwardens of St. Botolph* v. *The Parishioners of the Same* (2); *In re The Rector and Churchwardens of St. George's-in-the-East* (3); *Hansard* v. *The Parishioners of St. Matthew, Bethnal Green* (4); *The Rector and Churchwardens of St. Nicholas Cole Abbey* v. *The Parishioners of the Same* (5); *The Rector and Churchwardens of St. Benet Fink* v. *The Parishioners of the Same* (6); *The Rector and Churchwardens of St. Benet Sherehog* v. *The Parishioners of the Same* (7); *The Rector and Churchwardens of St. Nicholas Acons* v. *The Parishioners of the Same* (8); *The Vicar and Churchwardens of St. Andrew's, Hove* v. *Mawn and Others* (9); 2 Phillimore, Ecclesiastical Law, p. 1415; *The Vicar and Churchwardens of St. John the Baptist, Cardiff* v. *The Parishioners of the Same*. (10) These precedents shew clearly that the Court has jurisdiction to grant rights of user over a closed churchyard where there is, as here, a bonâ fide ecclesiastical purpose con-

(1) See *In re Plumstead Burial Ground*, [1895] P. 228, n.
(2) [1892] P. 161.
(3) (1876) 1 P. D. 311.
(4) (1879) 4 P. D. 46.
(5) [1893] P. 58.
(6) [1893] P. 58.
(7) [1893] P. 66, n.
(8) [1892] P. 66, n.
(9) [1895] P. 228, n. (4).
(10) [1898] P. 155.

nected and conjoint with the secular purpose in respect of which the faculty may be applied for, and to this extent are quite consistent with the earlier authorities of *In re Harrington* (1), *Lucking and Frost* v. *The Rector of Willingate* (2), *Atwood* v. *The Churchwardens of Hammersmith* (3), *In re St. Mary Abbotts, Kensington* (4), *In re St. Botolph's, Bishopsgate* (5), *In re St. Matthew, Bethnal Green* (6), *In re St. Sepulchre, London* (7), *In re St. James', Westminster* (8), *In re Christ Church, Newgate* (9), *Russell* v. *The Parishioners of St. Botolph* (10), *Campbell* v. *The Parishioners of Paddington* (11), and *In re Bettison* (12), where faculties were granted for the erection of schools or vestry rooms, and of *The Rector and Churchwardens of St. John's, Walbrook* v. *The Parishioners of the Same* (13), *Harper* v. *Forbes* (14), and *Reg.* v. *Twiss* (15), if the language there used is understood to refer to faculties for purposes purely secular. It may further be contended on principle that the consecration of a churchyard is no more in effect than a setting apart of the ground for the specific purposes of burial, and that as long as the ground can be no longer used for burial the Ordinary has full power to grant rights over it even for a purely secular purpose.

The case of *In re Plumstead Burial Ground* (16) conflicts with decisions of at least equal authority, and, having been decided on the issue of the citation, it is difficult to apply the language there used to cases where evidence has been given to satisfy the Court that the faculty will subserve some ecclesiastical as well as some secular purpose. [He also referred to 2 Gibson's Codex, App. 1470; Burn's Ecclesiastical Law, p. 371; *Pew* v. *Creswell* (17); *The Rector of St. George, Hanover Square* v.

(1) (1836) Tristram, 18.
(2) (1839) Tristram, 18.
(3) (1856) Tristram, 18; 5 Jur. (N.S.) 300.
(4) (1851) L. R. 4 Q. B. 409, n.
(5) (1859) L. R. 4 Q. B. 409, n.
(6) (1860) L. R. 4 Q. B. 409, n.
(7) (1860) L. R. 4 Q. B. 409, n.
(8) (1861) L. R. 4 Q. B. 409, n.
(9) (1864) L. R. 4 Q. B. 409, n.
(10) (1859) 5 Jur. (N.S.) 300.
(11) (1852) 2 Robert. 558.
(12) (1874) L. R. 4 A. & E. 294.
(13) (1852) 2 Robert. 515; 16 Jur. 645.
(14) (1859) 5 Jur. (N.S.) 275.
(15) (1869) L. R. 4 Q. B. 407.
(16) [1895] P. 225.
(17) (1735) 2 Str. 1013.

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*Steuart* (1); *Walter* v. *Montague* (2); *Butt* v. *Jones* (3); *Batten* v. *Gedye* (4); *The Vicar and Churchwardens of St. Gabriel, Fenchurch Street* v. *The Parishioners of the Same* (5); Archbishop Benson's Order as to Court Fees of July 22, 1889.]

*Gilmour*, for Edward C. Kirk, S. C. Nutman, and Samuel Kaye, parishioners of St. Nicholas, Leicester, appearing in opposition to the faculty. The Court ought not to grant the faculty even if the petitioners are right on the question of jurisdiction. There is no sufficient evidence of any benefit to those attending the church if the widening proposed is carried out. The only benefit really suggested is a benefit to the public, and it has never been held that a benefit to the public alone is a proper ground for the Court granting rights over the churchyard. There must be, at least, some ecclesiastical purpose subserved by the proposed faculty; and the grant of a faculty as proposed here for purely secular purposes would be a wrong exercise of discretion. [He referred to *The Vicar and Churchwardens of St. Botolph* v. *The Parishioners of the Same* (6); *The Rector and Churchwardens of St. Nicholas Cole Abbey* v. *The Parishioners of the Same* (7); *The Rector and Churchwardens of St. Benet Fink* v. *The Parishioners of the Same* (8); *In re Plumstead Burial Ground* (9); *The Vicar and Churchwardens of St. Andrew's, Hove* v. *Mawn and Others*. (10)] Moreover, it has not been shewn that any necessity exists even in the interests of the public for the churchyard being interfered with, or why a widening of St. Nicholas Street without touching the churchyard is not perfectly feasible.

But the Court has no jurisdiction to grant the faculty. The churchyard has been consecrated—that is, appropriated to ecclesiastical uses for ever—and what is now proposed to be done is that with the sanction of the Court it should be appropriated to secular purposes. It is true that it is not in form proposed that there should be a sale of the freehold; but can there be any

(1) (1740) 2 Str. 1126.
(2) (1836) 1 Curt. 253.
(3) (1829) 2 Hagg. Ecc. 417, at p. 424.
(4) (1889) 41 Ch. D. 507
(5) [1896] P. 95, 103.
(6) [1892] P. 161.
(7) [1893] P. 58.
(8) [1893] P. 58.
(9) [1895] P. 225.
(10) [1895] P. 228, n. (4).

doubt but that if the faculty is decreed the corporation will obtain complete control over the ground thrown into the road, and all the rights over the surface that it would have had if a conveyance of the freehold could have been made to it? The decisions in *The Rector and Churchwardens of St. John's, Walbrook* (1) and *Harper* v. *Forbes* (2), and the language in *Reg.* v. *Twiss* (3), where Cockburn L.J. expressed a very decided opinion that the doctrine laid down by Dr. Lushington is perfectly correct, that when ground is once consecrated and dedicated to sacred purposes, no judge has power to sanction the use of it for secular purposes, and that nothing short of an Act of Parliament can divest consecrated ground of its sacred character," shew the illegality of what is proposed, and that the grant of any faculty such as the petitioners ask for would be beyond the jurisdiction of the Court. The more recent decisions of the Consistory Court relied on on behalf of the petitioners cannot be reconciled with these authorities, and ought to be disregarded by the Court. As was pointed out in *In re Plumstead Burial Ground* (4), the grant of a faculty for the appropriation of a churchyard to secular purposes does no become legal because there may be also some colourable use of the ground for ecclesiastical purposes.

The objector Langton appeared by his solicitor.

*Cur. adv. vult.*

July 25. THE CHANCELLOR. This case arises on an application by the vicar and churchwardens of St. Nicholas, Leicester, and the corporation of Leicester for a faculty to use a strip of land at the south side of, and constituting part of, the churchyard of St. Nicholas as an addition to the road which runs east and west along the south side of the churchyard, upon the terms set forth in the petition.

The churchyard has been closed for burials by Order in Council. It is admitted that it is necessary to widen the street

(1) 2 Robert. 515.
(2) 5 Jur. (N.S.) 275.
(3) L. R. 4 Q. B. 407.
(4) [1895] P. 225.

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which at present runs along the south side of the churchyard of St. Nicholas, Leicester. The Great Central Station, now being erected in the immediate neighbourhood, will increase the traffic along this thoroughfare, already one of the main arteries through which the traffic of the town passes. The corporation of Leicester, who have been by the Legislature entrusted with the management of such matters, have, in the exercise of the discretion vested in them by Parliament, decided to widen this important thoroughfare from Applegate Street to the Clock Tower. The opponents do not contest the necessity of this, but they say, and have pleaded, that it is not necessary to take any portion of the churchyard, and that the scheme of the corporation might be so varied that, while the necessary widening should be secured, it should not involve taking any portion of the churchyard.

[The Chancellor proceeded to refer to the evidence as to the situation and traffic of the streets adjoining to the portion of the churchyard proposed to be widened; to the details of the scheme adopted by the corporation for the widening; of an alternate scheme brought before them and rejected by them, and of a third scheme which had been suggested by the opponents at the hearing and did not interfere with the churchyard; and, after coming to the conclusion that in the circumstances of the case the decision of the corporation that it was necessary to take the proposed portion of the churchyard amounted to a sufficient practical necessity for the purpose of the exercise of any discretion in granting the faculty the Court might have, and after referring also to the consideration to be given by the corporation, and stating that he did not consider himself bound where a large town was concerned to look merely to the benefit to the parishioners of St. Nicholas' parish, continued as follows:—]

I am not prepared to treat it as a light thing to disturb interments and throw the site into the adjoining street. But if the human remains are treated with all due care and reverence, and removed into consecrated ground, and the ancient and new position of each interment carefully marked and identified, if the wishes of the surviving relatives are consulted, and their

assent obtained, I am not prepared to say that the mere removal, with all these precautions, of human remains from one consecrated spot to another is so objectionable that it ought to outweigh every other consideration. I hold, therefore, that it is desirable in the interests of the public of this great city, of the parishioners, and of the church generally, that I should, if I have the power, accede to this application.

It is argued that I have no power—no jurisdiction to do what is proposed. And Mr. Gilmour puts it that I am asked to allow this piece of consecrated ground to be applied to secular uses, which, he says, I have no power to do. He admits that I have power (subject, of course, to appeal if I wrongly exercise the power) to allow its use for other purposes, if ecclesiastical; and, further, that if incidentally secular purposes are also subserved, that is no objection to the jurisdiction. There is certainly a serious conflict of authority, and, in order to discover what my duty is, it is necessary to examine carefully what is the result of the cases. In the case of *St. George, Hanover Square* v. *Steuart* (1) there was an application to erect a charity school on part of the churchyard. The rector and parishioners are said to have obtained a prohibition, for the reason (as stated in the report) that "the Ecclesiastical Court has nothing to do with this, and cannot compel them without their consent." The first half of the sentence has been treated as shewing want of jurisdiction; but the second half seems to imply that with their consent the erection could have been made. The report is very short; and if as it stands it is to be taken as an authority, the effect of the two halves of the sentence taken together must be that the want of jurisdiction consisted in the want of consent. This points, not to a general want of jurisdiction, but to some special and accidental impediment, such perhaps as interference with some common law right, or, at all events, some right which could not be interfered with. There is a case in 1831, cited in the report of the case of *St. Martin Orgars* (2), where Dr. Lushington granted a faculty giving the General Post Office a right to lights in a churchyard. The practice of Dr. Lushington is very material,

(1) 2 Str. 1126.

(2) (1890) Tristram, 146.

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because certain reported language of his has been the foundation of all arguments against the Ordinary's jurisdiction in these cases. I do not see any difference, if it is a bald question of the jurisdiction of the Ordinary, between the enjoyment of light and air and the enjoyment of a way-leave. In neither case can any real easement be created by the Ordinary. If the enjoyment of light and air be not an ecclesiastical purpose, I do not see how the harmlessness of the enjoyment can be material on the question whether the Ordinary has jurisdiction to allow it. In *Walter* v. *Montague* (1) the rector articled the churchwardens for opening a gate and making a path in the churchyard; and they wanted to excuse themselves by alleging that they were only restoring or substituting a thoroughfare illegally stopped by the rector himself. Dr. Lushington seems to assume that such a thoroughfare path might be granted by a faculty. In 1851 Dr. Lushington granted a faculty to erect a vestry-room for vestry and other meetings of parishioners in the churchyard, and for removing some gravestones for that purpose: *Re St. Mary Abbotts*, cited in *Reg.* v. *Twiss*. (2) Then came the case of *St. John's, Walbrook* (3), an application to throw part of the churchyard into a public road. There were no graves in that part, and there was plenty of burial room. Dr. Lushington refused the application, citing from his own memory the *Ewell Case* (4), before Sir C. Wynne. This was on May 28, 1852. The learned reporter does not seem to have understood the decision, for his note suggests that the reason was that a sentence of consecration is definitive. The case of *Campbell* v. *The Parishioners of Paddington* (5) was an application to erect a building for vestry and other parochial meetings on a piece of consecrated ground originally intended, but never in fact used, for an additional burial ground; and on July 8, 1852, Dr. Lushington granted the faculty, though apparently declaring that no judge could sanction the use of such ground for secular purposes. He must have meant secular purposes only; for he distinguished the case before him by saying that

(1) 1 Curt. 253.
(2) L. R. 4 Q. B. 409, n.
(3) 2 Robert. 515.
(4) Not reported.
(5) 2 Robert. 558.

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a vestry-room is employed for ecclesiastical as well as secular purposes; and he goes on to say that those taking the faculty must remember that they take it liable to all objections and proceedings which may be raised and had in another court. It is clear that he was well aware that he was granting a faculty for the use of the churchyard for secular purposes, though, no doubt, coupled with ecclesiastical purposes. I cannot understand how this case of *Campbell* v. *The Parishioners of Paddington* (1) can be treated as a decision by Dr. Lushington that he had no jurisdiction to grant a faculty for secular and ecclesiastical purposes combined. If these two decisions of the same judge within six weeks of one another cannot be reconciled, the latter appears to have been certainly more fully argued and more fully considered. On March 14, 1859, Sir Travers Twiss granted a faculty for an infant school for the parish. (2) In *Harper* v. *Forbes* (3) Dr. Lushington in effect repeated his observations in the *Walbrook Case* (4); but it was a criminal suit against the churchwardens of Reigate for throwing part of the churchyard into the public road; and Dr. Lushington's remarks were made apparently off-hand, in answer to counsel desiring to offer some excuse in mitigation. There does not appear to have been any formal argument of the point. Next in chronological order come the cases of the National School at St. Matthew, Bethnal Green, the schoolrooms at St. Sepulchre's, the enlargement of a vestry-room at St. James', Westminster, and the National Schools at Christ Church, Newgate Street—all referred to in L. R. 4 Q. B. 409, n. Then in 1869 came the case of *Reg.* v. *Twiss* (5), in which there are strong remarks of Cockburn C.J. to the effect that there is no jurisdiction in cases similar to the present. But what was that case? Prohibition was asked for and refused; and, consequently, the remarks of the learned judge on the question of jurisdiction cannot be said to be the grounds of the decision. Cockburn C.J. says: "I do not hesitate to express a very decided opinion that the doctrine laid down by Dr. Lushington

(1) 2 Robert. 558.
(2) L. R. 4 Q. B. 409, n.
(3) 5 Jur. (N.S.) 275.
(4) 2 Robert. 515; 16 Jur. 645.
(5) L. R. 4 Q. B. 407.

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is perfectly correct, that when ground is once consecrated and dedicated to sacred purposes, no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an Act of Parliament can divest consecrated ground of its sacred character; and the cases before the learned judge, and the case of *St. George's, Hanover Square* (1), are quite sufficient to affirm that as a general proposition. But we purpose to dispose of the present application on narrower grounds." I think that when the learned judge uses the expression "as a general proposition," it is not fair to treat it as equivalent to "an universal proposition." He is introducing the real reasons for refusing the prohibition; and it is rather by way of emphasizing those reasons that he paints in strong colours, by way of concession in argument, the case for granting the prohibition. He cites the distinction taken in *Campbell* v. *The Parishioners of Paddington* (2) between purposes purely secular and those of an ecclesiastical character, and relies upon Dr. Lushington for the doctrine that no judge has power to sanction the use of the ground for secular purposes. But in *Campbell* v. *The Parishioners of Paddington* (2) Dr. Lushington deliberately sanctioned secular purposes when combined with ecclesiastical purposes. It is obvious from what Cockburn C.J. says in *Reg.* v. *Twiss* (3) that he considered that secular purposes could not be within the jurisdiction though combined with ecclesiastical purposes. Here I think he goes further than Dr. Lushington, and further than Mr. Gilmour's contention before me. But, on the whole, I think that what the Lord Chief Justice meant was to follow Dr. Lushington; and the best method of seeing what this involved is to examine Dr. Lushington's judgments and practice at first hand. Since *Reg.* v. *Twiss* (4) there have been the cases of *St. Mary-le-Strand Churchyard* (5), where a piece of a disused churchyard was allowed by Sir Travers Twiss to be used as a public road; of *St. Mary Abbotts* (6), where the like was done by the present

(1) 2 Str. 1126.
(2) 2 Robert. 558.
(3) L. R. 4 Q. B. at p. 412.
(4) L. R. 4 Q. B. 407.
(5) (1872) Tristram, 18.
(6) (1872) Tristram, 17; [1892] P. 169, per Dr. Tristram.

learned Chancellor of London; and *Re Bettison* (1), where a faculty was granted by Sir Robert Phillimore in the Arches, on appeal from Rochester, for the erection of a National School; *Re St. George's-in-the-East* (2), where it was allowed to make a garden of a closed churchyard; *Hansard* v. *The Parishioners of St. Matthew, Bethnal Green* (3), where a mortuary was allowed, but not a room for coroners' inquests; and it appears from the citation in that case that faculties had already been granted in 1860 and 1862 for schools on other parts of the same churchyard. In the last-mentioned case the learned Chancellor stated that the objection to the coroner's room was that the control was taken from the Ordinary. With great respect, I agree in the view that an act which purported to divest the Ordinary of his control may with much reason be held to be beyond his jurisdiction. Then, in 1879, there was the case of *The Rector and Churchwardens of St. George, Hanover Square* v. *Hall* (4), where the learned Chancellor of the Diocese of London granted a faculty for a mortuary and a post-mortem room. This was an opposed case; but the opponents do not seem to have urged any excess of jurisdiction, or to have applied for a prohibition; but I lay the less stress upon this, because it appears from a note in Tristram's Reports, p. 91, that the Duke of Westminster subsequently presented the vestry with another site; and from Tristram's Reports, p. 271, that the mortuary was abandoned. In *St. Martin Orgars* (5) a faculty was granted to secure to an adjoining owner light and air over a closed churchyard for ninety-nine years. In 1891 the learned Chancellor of the Diocese of Worcester is said (6) to have allowed a portion of the churchyard to be used for widening a roadway; and in 1892 the learned Chancellor of the Diocese of London again did the like: *Re St. Botolph.* (7) In this case the Chancellor explains the origin of the practice in the case of disused churchyards. I need only mention the case of the Electric Lighting Chamber (*Re St. Nicholas Cole Abbey* (8))

(1) L. R. 4 A. & E. 294.
(2) Tristram, 38; 1 P. D. 311.
(3) Tristram, 74; 4 P. D. 46.
(4) (1879) Tristram, 84; 5 P. D. 42.
(5) Tristram, 145.
(6) [1895] P. 228.
(7) [1892] P. 161.
(8) [1893] P. 58.

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and the other cases there referred to: *Re St. Mary-in-the-Castle, Hastings* (1), cited in *In re Plumstead Burial Ground* (2), and *The Hove Case*. (3) The case of *St. Gabriel, Fenchurch Street* (4), was before the Arches Court on appeal. It turned on a different point; but it seems that the general power to grant a right over the churchyard was not considered as impossible—it was put aside as immaterial in the circumstances. I must also mention the fact, brought to my attention by Mr. Arnold Statham, that the official schedule of fees approved by the Archbishop of Canterbury for the officials of this province on July 22, 1889, fixes among other things a fee for the hearing of an application for a faculty for laying out a closed churchyard as a garden, or for throwing part of it into a street or road. There is, of course, the important *Plumstead Case* (2), where the learned Chancellor of Rochester held that he had no jurisdiction. He relied on the judgment of Cockburn C.J. in *Reg.* v. *Twiss* (5) and the language of Dr. Lushington. It is to be observed that in the *Plumstead Case* (2) the petitioners alleged among other things that the widening of the roadway by a strip taken from the churchyard would greatly conduce to the convenience of those attending the church. This was an ecclesiastical purpose. The case was heard on motion for citation without evidence; therefore it must be taken as a decision that, even though this particular allegation should be proved up to the hilt, still there was no jurisdiction. I think this was going further than Dr. Lushington, on a fair view of all the cases before him, intended to go. On that principle he would have refused instead of granting the faculty in *Campbell* v. *The Parishioners of Paddington* (6), for where the use is to be both secular and ecclesiastical, I cannot think that the jurisdiction as distinguished from the propriety can depend on the comparative importance of the two uses. Cockburn C.J. obviously considered that the ecclesiastical use could not on the question of jurisdiction carry the secular use on its back. That the Ordinary retains jurisdiction over a churchyard notwithstanding

(1) [1895] P. 232, n.
(2) [1895] P. 225.
(3) [1895] P. 228, n. (4).
(4) [1896] P. 95.
(5) L. R. 4 Q. B. 407.
(6) 2 Robert. 558.

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its consecration to the burial of the parishioners is a proposition which I think will be disputed by no one. That the rights of the parishioners are not unalterably fixed by the consecration, but may be to some extent varied by the subsequent exercise of the Ordinary's jurisdiction, will be admitted at once by any one who calls to mind the practice of appropriating private vaults by faculty. See also *Keet* v. *Smith* (1), where a faculty for a tombstone was in question. Indeed, one might say that it is the consecration which gives the jurisdiction. It was admitted by Cockburn C.J. that there is jurisdiction to allow buildings for ecclesiastical purposes to be erected on the churchyard.

It is argued that such a thing as I am now asked to do was never done before the Act of 1852 for closing churchyards, that it could not have been done, and that the closing of the churchyard can give no jurisdiction to do it. I do not think it follows from admitting all these propositions that it cannot be legally done now in the case of a closed churchyard. In the case of a churchyard still in use for burials it may be that the Ordinary has not only no right to curtail the space in which the parishioners have rights of burial, but also no power by his decree to interfere with those rights. If the Ordinary's want of power to curtail those rights was the real reason why it could not be done (and to this theory the case in Strange lends countenance: *The St. George, Hanover Square Case* (2)), it would seem to follow that when that particular impediment no longer exists, the general jurisdiction and control of the Ordinary over the churchyard would not indeed arise, but would be freed from that particular impediment. This point could not have been raised in any of the cases before Dr. Lushington, for they were of too early a date. It can only apply to churchyards closed for burial. I cannot regard the case before Dr. Lushington in 1831 (3) of the General Post Office in any other light than as a decision, whether considered or not, by Dr. Lushington that he had jurisdiction to allow secular purposes unconnected with ecclesiastical purposes, where the purpose of consecration was

(1) (1875) 1 P. D. 73.

(2) 2 Str. 1126.

(3) Tristram, 146.

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not interfered with. I feel great difficulty in assenting to the argument that because no such faculty was granted before 1852 therefore there was no jurisdiction to grant such a faculty. The reason may have been the impropriety, which would be matter of appeal; and not want of jurisdiction, which alone would be matter for prohibition. I suppose it would be difficult to find until quite recent times, certainly until later than 1852, a faculty for a rood-screen or a second altar; but would it follow that there was no jurisdiction to grant such a faculty? A distinction may be drawn between different kinds of secular uses—between those which are perfectly harmless—e.g., enjoyment by a private house of light and air over the churchyard—and others which in their nature are calculated to offend and outrage our feelings. So far as this is a matter for my discretion, I think the point is already settled by several decisions of Ecclesiastical Courts in favour of applications similar to that which is now before me. But if it is put as material on the question of jurisdiction, then it is to be observed that the dicta relied on by Mr. Gilmour speak simply of "secular uses" without suggesting any classification of secular uses.

It is said that the mere fact of the churchyard having been consecrated stands in the way of my granting this application; and there is a passage in the judgment of Cockburn C.J. in *Reg.* v. *Twiss* (1) where he says: "when ground is once consecrated and dedicated to sacred purposes no judge has power to grant a faculty to sanction the use of such ground for secular purposes." I can understand consecration to use as a burial ground, or to some other specified purpose; but I do not think the Lord Chief Justice really meant to decide that there could be such a thing as consecration in gross as it were, unconnected with any particular purpose. At any rate, it is difficult to see how a consecration limited to one particular purpose can have an ousting effect on the ecclesiastical jurisdiction which will extend beyond that limited purpose. This argument from mere consecration, without regard to the purpose for which the consecration is made, must apply to everything consecrated. There seems no rational ground for limiting

(1) L. R. 4 Q. B. 407.

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it to land or soil. The fabric of a church is just as much consecrated as the land on which it stands. Yet it is an everyday practice to grant faculties for such things as, for instance, removing plain glass to substitute coloured glass, or for removing a gallery.

I wish it to be clearly understood that I have no power to settle the limits of my own jurisdiction. I have examined the cases for the purpose of ascertaining whether a limit is clearly established which would exclude my power to grant this application. If I found that any such limit was well established, I naturally should desire to keep within it. But I do not find that. And, in these circumstances, I shall follow the precedent set by Dr. Lushington in *Campbell* v. *The Parishioners of Paddington* (1), and shall grant the faculty, at the same time warning the applicants that they take it subject to all objections and proceedings which may be raised and had in another court.

With regard to the removal of interments, the faculty must be subject to a provision that the remains to be removed shall be reverently reinterred in the vacant ground on the north side of the church, or, if there should be no room there, or if the relatives do not object, in the Leicester cemetery; and that the relatives interested shall have liberty by themselves or their agents to superintend the removal of the remains; that an exact record be kept and deposited in the church chest, or other like depositary, of the place from which and the place to which each corpse is removed, and of the gravestone (if any) relating to each interment; and that the gravestones relating to the remains removed be set up against the wall of St. Nicholas' church. There must also be a proviso in the faculty that sufficient landmarks or stones be placed and preserved to indicate the position of the present boundary. As part of the consideration is the surrender of a piece of ground and of a right of way, I shall require a certificate from counsel that the title may be accepted, and the faculty will not issue until this is filed in the registry. I think that in point of form the faculty ought to be granted to the vicar and churchwardens, omitting the corporation. It

(1) 2 Robert. 558.

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seems to me that the character of the ecclesiastical jurisdiction is better fitted to deal with individuals than with corporations aggregate.

Solicitor for petitioners: *Town Clerk of Leicester.*
Solicitor for objector Langton: *T. B. Neale.*
Solicitor for other opponents: *Curtis.*

C. F. J.

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1898
*Nov.* 7.

## IN THE GOODS OF BRASIER.

*Probate — Will — Practice — Obliteration — Words of Will before Alteration whether "Apparent" — Evidence of Experts in Writing — Wills Act* (1 *Vict.* c. 26), s. 21.

The Court, on motion, allowed words beneath alterations in a will to be substituted, as "apparent" within the meaning of s. 21 of the Wills Act (1 Vict. c. 26), upon proof that they could be deciphered by an expert in handwriting using a magnifying glass.

MOTION on behalf of the administrator with the will annexed of Thomas Brasier, late of Castle Cottage, near Gatacre, in the parish of Claverley, Shropshire, who died on January 9, 1897, that certain erasures and alterations in the will might be filled up by the restoration of names alleged to have been originally written therein.

The will consisted of three testamentary documents, the first prepared by a solicitor and dated March 27, 1874, appointing executors and leaving real and personal property among the testator's wife Hannah, and his three sons Daniel, Charles, and Thomas Ash, Brasier, and constituting his wife residuary legatee; the second, a codicil dated December 24, 1881, appointing other executors; the third, a holograph will dated June 4, 1884, and appointing executors, from the probate of which the following is an extract:—

"I give and bequeath to my son Charles Brasier the house and stable and all the lands at the Broad Lanes for him and his heirs and assigns for ever, I give and bequeath to my son Thomas Ash Brasier the cottage and garden and land at the Broad Oak in the parish of Claverley in the county of Salop,

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I give and bequeath the cottage and garden at the Broad Lanes to my son ——— Brasier for him and his assigns for ever, I give and bequeath to my son ——— Brasier the cottage at Portobello near Wolverhampton in the county of Stafford, and I leave unto ——— Brasier three hundred pounds in money at my decease."

The blanks contained names which appeared to have been written over erasures.

Mr. T. H. Gurrin, an expert in handwriting, deposed that he had examined the will with a powerful magnifying glass, and found that these names, which were respectively "Daniel," "Thomas," and "Thomas," had been altered, and that the name originally written was in each case "Daniel."

The surviving attesting witness was unable to state whether the alterations had been made when the will was executed.

All the executors were dead. The testator's wife and three sons survived him, but she and Thomas Ash Brasier had since died.

The applicant was Daniel Brasier, who had obtained the consent of Charles Brasier, and that of the widow of Thomas Ash Brasier. It did not appear whether Hannah Brasier or Thomas Ash Brasier had made a will.

*Priestley*, in support of the application. The word "Daniel," being visible to an expert using a magnifying glass, is "apparent" within the meaning of s. 21 of the Wills Act, and should be substituted in the blank spaces. (1)

(1) By the Wills Act (1 Vict. c. 26), s. 21, "And be it further enacted, that no obliteration, interlineation or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will." See the instructions given by the Court to experts in writing in *Ffinch* v. *Combe*, [1894] P. 191, at pp. 192–4.

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BRASIER, IN THE GOODS OF.

GORELL BARNES J. An order may be made in the terms of the motion, on proof being given to the registrar that all the persons interested in the estate are before the Court.

Solicitors: *Gibson, Weldon & Bilbrough, for R. F. Haslewood, Bridgnorth.*

H. D. W.

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1898

*Nov.* 14.

## SPICER *v.* SPICER.

*Probate—Practice—Proof in Solemn Form—Notice by Defendant to Cross-examine only—Order* XXI., *r.* 18—*Rules of the Supreme Court, July*, 1898.

By Order XXI., r. 18, as amended by the Rules of the Supreme Court, July, 1898, "In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists on the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will."

The judge, being of opinion that the defendants in a probate action had opposed the will without reasonable ground, ordered them to pay the costs of the other side, under the amended rule.

PROBATE action in which the plaintiffs Mary Jane Spicer, widow of Frederick Spicer, as executrix, and Frederick John Shaw, as executor of Frederick Spicer, late of 10, Woodville Terrace, in the county of Kent, Trinity House pilot, propounded his will and a codicil thereto, the defendants Margaret Ann Spicer, Ellen Alexandra Spicer, and Flora Louise Spicer, the children of the testator by a former marriage, having given notice under Order XXI., r. 18, that they merely insisted on the will being proved in solemn form of law, and only intended to cross-examine the witnesses produced in support thereof.

After the attesting witnesses had been examined and cross-examined, the Court granted probate of the will.

It appeared that the defendants' solicitors had applied to have the case tried before a common jury, stating that there would be a plea of undue influence, but had withdrawn this application; and letters were read in which the plaintiffs'

solicitors called upon them to withdraw the defence and stated that they intended to apply to the Court for costs.

*Barnard*, for the plaintiffs, applied for costs under Order XXI., r. 18, as amended by the Rules of the Supreme Court of July, 1898.

*R. F. Bayford*, for the defendants, stated that their solicitors had not known of the alteration in the terms of the rule.

SIR F. H. JEUNE, PRESIDENT. The present rule is, that a defendant in a probate action, who gives notice that he merely insists on the will being proved in solemn form, and only intends to cross-examine the witnesses produced in support of it, "shall not in any event be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will." These words have been substituted for the "defendant shall be subject to the same liabilities in respect of costs, as he would have been under similar circumstances, according to the practice of the Court of Probate, before the Principal Act came into operation." (1)

I must confess that I never could understand what was the reason of the old rule; I suppose it must have had a historical origin. I never was able to understand why defendants in probate suits should not be called upon to make up their minds either to admit or dispute the will, without being allowed a skirmish at no risk of paying costs and at expense to the estate. Henceforth, under the new rule, the question will be whether the defendants have reasonable grounds for opposing

(1) By Order XXI., r. 18, as amended by the Rules of the Supreme Court, 1898, "In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists on the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, *and shall not, in any event, be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will.*" The words in italics have been substituted for "the defendant shall be subject to the same liabilities in respect of costs, as he would have been under similar circumstances, according to the practice of the Court of Probate, before the Principal Act came into operation."

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the will; and, if they have not, they will be liable to be condemned in costs.

It has been said that in this case the defendants' solicitors did not know of the alteration. But, when a new rule has come into force, it must be taken to be known, and, at any rate, when they came to know the rule they ought to have withdrawn their notice. It was not their counsel's fault that his cross-examination of the attesting witnesses was a mere repetition of the examination-in-chief. It was as good as it was possible for it to be, but it amounted to nothing, and it did not suggest either defective execution, testamentary incapacity, or undue influence. The case is an example of the precise abuse which the new rule was intended to prevent. The costs of the plaintiffs must be paid by the defendants.

Solicitors: *G. F. Gray; Shaw, Tremellen & Kirkman, for Mitchell & Macartney, Gravesend.*

H. D. W.

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## IN THE GOODS OF HARTLEY.

1898

*Nov.* 14.

*Administration—Bastardy—Escheated Land—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1.

The Land Transfer Act, 1897 (60 & 61 Vict. c. 65), does not bind the Crown, and, therefore, the legal estate in escheated land does not, under s. 1, vest in the Solicitor to the Treasury as the Crown's nominee.

Where a widow died, after the commencement of the Act, without issue, a bastard and intestate, entitled to both real and personal estate, a grant was made by the Court to the Solicitor to the Treasury of administration of her personal estate only, as before the Act.

MOTION on behalf of the Solicitor to the Treasury for a grant to him, as Her Majesty's representative, of administration of the estate of Elizabeth Hartley of Greenside, Wortley, in the county of York, who died on July 22, 1898, a widow without issue, a bastard and intestate.

The intestate was entitled to an estate in fee simple in certain cottages in addition to personal estate, and both the real and the personal estate had devolved on the Crown.

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*Newson*, in support of the motion. The Law Officers have advised that the Crown is not bound by the Land Transfer Act, 1897 (1), and that, therefore, the legal estate in escheated land does not vest in the Solicitor to the Treasury as administrator under s. 1. If so, the grant to him should be of administration of the personal estate only, as before the Act.

SIR F. H. JEUNE, PRESIDENT. The Act does not bind the Crown. The grant to the Solicitor to the Treasury should be of administration of the personal estate only.

Solicitor: *Solicitor to the Treasury.*

(1) By the Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 1, "(1.) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

"(2.) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

"(3.) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

"(4.) The expression 'real estate' in this part of this Act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

"(5.) This section applies only in cases of death after the commencement of this Act."

H. D. W.

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*Nov.* 14.

## DE LAUBENQUE *v.* DE LAUBENQUE.

*Divorce—Desertion—Desertion without previous Cohabitation.*

There may be desertion without previous cohabitation.

Where a husband and wife separated immediately after their marriage, and never cohabited, but it appeared that it was the husband who refused to cohabit, the wife having been always willing to do so, the Court found that the husband had been guilty of desertion.

UNDEFENDED divorce case, in which Mary Theresa de Laubenque claimed a dissolution of her marriage with Gustave de Laubenque on the ground of adultery and desertion.

The marriage took place in Edinburgh on September 10, 1888, the petitioner, Miss Adair, being then seventeen, and the respondent, who was a medical student at the University, twenty-two. He had asked her to elope with him, but she had refused. They were Roman Catholics, and were married before the registrar for the district of St. Andrew's, and afterwards in the Roman Catholic cathedral. The petitioner's father was present on both occasions.

The petitioner and the respondent drove in the same carriage from the registry to the cathedral, and walked side by side from the altar to the door, after the religious ceremony, and they met in the street the next day in the presence of the petitioner's father, but they never cohabited.

The respondent had represented himself to the petitioner and her father as a French gentleman of property and position, and as having an uncle, a physician in good practice in Paris, who would take him into partnership after he had finished his studies. He had also stated that the marriage required to be legalized in France, and, after it had taken place, he went from Edinburgh to Paris to procure, as he alleged, a certificate.

As he did not return, the petitioner's father on October 3 followed him to Paris, where he discovered that the respondent was without means and that his statements were untrue. He, however, said, "As soon as you can keep her, there is my daughter for you"; and the respondent agreed to meet him at

Euston Station, and go with him to Edinburgh, where the petitioner and her mother had been looking for a house, but he did not go to Edinburgh.

Later in 1888 the petitioner's father, without her consent, took proceedings in the court of the Roman Catholic Archbishop of Edinburgh and St. Andrew's to have the religious marriage declared void, and after a long interval it was annulled by the Pope on the advice of the Congregation as "ratum sed non consummatum."

The petitioner deposed that she was "prepared to receive the respondent if he had come back to Edinburgh, notwithstanding all that she had heard, and to live with him," that "she was still attached to him, and would have lived with him then or at any subsequent time," till she heard that he had committed adultery.

The respondent was proved to have been living in adultery in London in 1896. He was not a Frenchman, but a native of St. Lucia in the West Indies, and, therefore, a British subject, and he lived and did business in London.

*Inderwick, Q.C.* (*Priestley* with him), for the petitioner. The evidence proves desertion. The respondent married the petitioner with a determination not to live with her. Groundless refusal to cohabit surely constitutes desertion.

[SIR F. H. JEUNE, PRESIDENT. Can there be desertion where there has never been cohabitation? If a married couple separate at the church door, is desertion possible?]

An officer who on the day of his marriage is ordered abroad with his regiment, and leaves England without having cohabited with his wife, may surely be guilty of desertion. [He cited *Fitzgerald* v. *Fitzgerald* (1) and *Buckmaster* v. *Buckmaster*. (2)]

SIR F. H. JEUNE, PRESIDENT. I think the case is made out. The respondent's domicil appears to be English. The Court has, therefore, jurisdiction. He has clearly been guilty of adultery, and I think desertion has also been proved.

For whatever reason, after the solemnization of the marriage,

(1) (1869) 1 P. & M. 694. (2) (1869) 1 P. & M. 713.

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he determined not to consort with the petitioner. On her part, there was no refusal to cohabit, as in *Fitzgerald* v. *Fitzgerald* (1); nor did she bargain not to live with him, in the manner which led the Court to say, in *Buckmaster* v. *Buckmaster* (2), that, till the bargain was put an end to, desertion was impossible. Her father's words, "As soon as you can keep her, here is my daughter for you," might, perhaps, if they stood alone, have been held to absolve him; but they must be taken in conjunction with her own statement that she was always willing to live with him. She did not consent to his living apart, and, this being so, his refusal to cohabit constituted, in my opinion, desertion. There will be a decree nisi with costs.

Solicitors: *S. M. & J. B. Benson.*

(1) 1 P. & M. 694.

(2) 1 P. & M. 713.

H. D. W.

## THE BRUNEL.

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*Nov.* 14;
*Dec.* 7.

*Admiralty — Limitation of Liability — Exemption from Registry — "Tons burden" — "Tonnage" — Crew Space — Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 3, *sub-s.* 1; *s.* 503, *sub-s.* 2 (*a*).

By s. 3, sub-s. 1, of the Merchant Shipping Act, 1894, ships not exceeding fifteen "tons burden" employed solely in navigation on the rivers or coasts of the United Kingdom, are exempted from registry. By s. 503, sub-s. 2 (*a*), the owners of a steamship shall not, where, without their actual fault or privity, any loss or damage is caused to any other vessel, by reason of the improper navigation of their steamship, be liable to damages beyond 8*l.* for each ton of the "gross tonnage" of the steamship without deduction on account of engine-room, but deducting the space "certified" under the Act to be occupied by seamen:—

*Held*, by Gorell Barnes J., first, that, under s. 3, a small tug—solely employed in the manner mentioned in the section—of the "gross tonnage," if measured in accordance with the Act, of 35·99 tons, was exempted from registry as, after deducting 17·80 tons for engine-room space, and 6·73 tons for crew space, she did not exceed fifteen "tons burden" within the meaning of the Act, although her weight-carrying capacity in her cargo spaces, with a sufficient freeboard, would exceed that tonnage.

Secondly, that as the vessel was properly exempted from registry, her owners were entitled, under s. 503, to limit their liability to 8*l.* for each ton of her "gross tonnage," ascertained by measuring her according to the Act; but, the crew space not being "certified" as required by the section, that space could not be deducted.

Action of limitation of liability.

The plaintiffs were the mayor, aldermen, and burgesses of the City of Bristol, owners of the *Brunel*; the defendants were the owners of the *Glanmire*.

The question was whether the *Brunel*, a small tug used by the plaintiffs in the river Avon and the Bristol Docks, was exempted from registry under s. 3, sub-s. 1, of the Merchant Shipping Act, 1894, as being under fifteen tons burden, and, if exempted, on what tonnage her owners were entitled to limit their liability under s. 503, sub-s. 2 (*a*), of the same Act. (1)

(1) 57 & 58 Vict. c. 60, s. 3: "The following ships are exempted from registry under this Act:—

"(1.) Ships not exceeding fifteen tons burden employed solely in navigation on the rivers or coasts of the United Kingdom . . . ."

Sect. 503: "(1.) The owners of a ship, British or foreign, shall not, where all or any of the following

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On October 27, 1897, a collision occurred in the river Avon between the steam-tugs *Brunel* and *Iris*. The latter was towing the steamship *Glanmire*, and, the tow-rope having been cast off, the steamship took the ground, and, it was alleged, thereby sustained damage. The owners of the *Brunel* settled with the owners of the *Iris* in respect of the damage to that tug; but the owners of the *Glanmire* commenced an Admiralty action against the owners of the *Brunel*, claiming damages. The further prosecution of the action was, however, by agreement postponed pending the present proceedings.

The gross tonnage of the *Brunel*, ascertained by measurement in accordance with the provisions of the Merchant Shipping Act, 1894, is 35·99 tons, her engine-room space 17·80 tons, and her crew space 6·73 tons.

The plaintiffs, as owners of the *Brunel*, by their statement of claim alleged that the collision occurred without their actual fault or privity, admitted that it occurred by reason of the negligent navigation of the *Brunel* by their servants, and offered to pay into court, with interest at 4 per cent. from the date of the collision, the sum of 234*l.* 1*s.* 8*d.*, being 8*l.* per ton on 29·96 tons, that is, on the alleged gross tonnage of the *Brunel*, without deduction on account of engine-room, but less the crew space.

On behalf of the plaintiffs, it was contended, first, that the

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occurrences take place without their actual fault or privity; that is to say, . . . .

"(*d*) Where any loss or damage is caused to any other vessel; or to any goods, merchandise, or other things whatsoever on board any other vessel, by reason of the improper navigation of the ship—

be liable to damages beyond the following amounts; that is to say, . . . .

"(ii.) in respect of loss of, or damage to, vessels, goods, merchandise, or other things . . . . an aggregate amount not exceeding eight pounds for each ton of their ship's tonnage.

"(2.) For the purposes of this section—

"(*a*) The tonnage of a steamship shall be her gross tonnage without deduction on account of engine-room . . . .

"Provided that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled (Sched. VI.) to this Act with regard thereto."

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*Brunel* was exempted from registry under s. 3 of the Merchant Shipping Act, 1894, as she was employed solely in the manner mentioned in that section, and, if measured in accordance with the Act, she did not exceed fifteen tons burden, the words "tons burden" referring to the carrying capacity of the vessel ascertained by measurement in the way detailed in the second schedule of the Act, and, in so measuring her, the space occupied by the propelling power, and the crew space would be deducted from the gross tonnage.

Secondly, that the *Brunel*, being properly exempted from registry, was a British ship the owners of which were entitled to limit their liability under s. 503 to an amount calculated on the "tonnage" of the vessel ascertained by measurement in the way prescribed by the Act; but it was admitted in the course of the argument that the plaintiffs—not being at the time of the collision in possession of the certificate required by that section shewing that the regulations set out in Sched. VI. of the Act had been complied with—could not deduct the crew space from the gross tonnage of the vessel ascertained by measurement.

On behalf of the defendants, it was contended, first, that "tons burden" in s. 3 of the Act of 1894 means actual carrying capacity, and, as the *Brunel* could carry more than fifteen tons weight in her cargo spaces, and yet have a proper freeboard, she was not exempted from registry under that section. Secondly, that, not being exempted from registry, and not having in fact been registered, she was not a recognised British ship, the owners of which could limit their liability under s. 503 of the same Act.

Nov. 14. *Pyke, Q.C.*, and *Lauriston Batten*, for the plaintiffs, the owners of the *Brunel*

*Aspinall, Q.C.*, and *Butler Aspinall*, for the defendants, the owners of the *Glanmire*.

The arguments of counsel fully appear from the judgment, and all the material sections of the statutes referred to are there set out.

*Cur. adv. vult.*

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Dec. 7. GORELL BARNES J. The question is whether the plaintiffs are entitled to limit their liability in respect of any damages caused by the negligent navigation of the *Brunel* for which they may be liable to the defendants.

The *Brunel* was not registered under the Merchant Shipping Act, 1894; and it was contended, on behalf of the plaintiffs, her owners, that as the *Brunel* was employed solely in navigation in the river Avon, if she did not exceed fifteen tons burden, she would be exempted from registry by s. 3 of that Act, and that the plaintiffs, as her owners, would be entitled to the protection conferred by s. 503; but it was admitted that if she exceeded fifteen tons burden, the effect of ss. 2, 72, and 508 would be to prevent her from being recognised as a British ship, and her owners from obtaining the protection of s. 503.

It was further admitted by the plaintiffs that the *Brunel* could carry more than fifteen tons weight in her cargo spaces, and have a proper freeboard; but it was proved before me that if she were measured in accordance with the provisions of the Act her gross tonnage would be 35·99 tons, that her boiler and engine spaces would measure 17·80 tons, and her crew space 6·73 tons; so that, if these spaces are deducted from the gross tonnage, her tonnage would be under fifteen tons. If the allowance for propelling power is made in accordance with the Act, the evidence shews that one and three-quarter times the engine and boiler space and the crew space would be deducted from the gross tonnage, to arrive at the register tonnage, and the result would be a minus quantity. This is owing to the allowance for propelling power being fixed by the Act at one and three-quarter times the actual boiler and engine space.

The plaintiffs maintain that the words fifteen "tons burden" in s. 3 mean fifteen tons measured according to the Act of 1894; whereas the defendants contend that they mean a capacity to carry fifteen tons weight of cargo. It was not disputed, as I understood the argument, that, ordinarily speaking, fifteen tons burden means a capacity to carry fifteen tons; but the point made by the plaintiffs was that the words "tons burden" in the Act of 1894 are used in a sense in which they have been used in prior Acts of Parliament relating to the registration of

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British vessels, and refer to tons of capacity as measured by the Act.

The first Act to which I need refer is 7 & 8 Will. 3, c. 22 (1696). This Act required English ships to be registered in order to be qualified to trade to or from the plantations in America, and proof had to be made upon oath in a form set out in s. 17 of the Act, which, amongst other things, described the ship as "of —— [burthen] tons," but there was no provision as to the mode of arriving at the tonnage. By the Act 6 Geo. 1, c. 21 (1719), it was provided by ss. 29 and 31 that no brandy should be imported in any ship "of the burthen of thirty tons or under," and that ships "of the burthen of fifty tons or under" in part or fully laden with brandy, at anchor or hovering within two leagues of the shore, might be compelled to come into port, &c., &c. Sect. 33 is as follows: "And for the preventing disputes that may arise concerning the admeasurement of ships laden with brandy and other spirits as aforesaid, or ships hovering on the coast: be it further enacted by the authority aforesaid, that the following rule shall be observed therein, that is to say, take the length of the keel within board (so much as she treads on the ground), and the breadth within board by the midship beam, from plank to plank, and half the breadth for the depth, then multiply the length by the breadth, and that product by the depth, and divide the whole by 94, the quotient will give the true contents of the tonnage, according to which rule the tonnage of all such ships or vessels shall be measured and ascertained; any law, custom, or usage to the contrary notwithstanding."

It is, I think, clear that the tonnage arrived at in the above manner was to be considered as fixing the burden of the vessel. The reason for this appears to have been that at that time, as ships were then constructed, the measurement, in the manner above stated, gave approximately the burden of the vessel. In an old work on shipbuilding by William Sutherland, published in 1729, it is stated (part 2, dated 1719, p. 3) that it was a general rule to find the tonnage of a vessel by taking the length of the keel and breadth from the outside of the ship on one side to the outside of the other, and multiplying that breadth into the length

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and again by half the said breadth, and dividing the product by 94. The author points out that there is no exact rule to find the tonnage, since two ships may be of equal length, breadth and depth, and yet one shall carry two or three hundred tons more than the other, and he makes certain suggestions as to measurement. In the first part of the work (p. 1) it is stated that the rule made use of to cast the tonnage is a medium rule, and there seems little doubt that the provisions of the above-mentioned s. 33 were derived from this general rule.

The Act of 15 Geo. 2, c. 31 (1742), contains further provisions for regulating the plantation trade, and gives a form of oath by a master in which he is to set out the burden of his vessel in tons. In 1773 the Act 13 Geo. 3, c. 74, intitled, "An Act for the better ascertaining the tonnage and burthen of ships and vessels importing and exporting goods into and from this kingdom or hovering upon the coasts thereof," &c., &c., was passed. By s. 1 it was enacted that: "The tonnage and burthen of any ship or vessel importing or exporting brandy, or other spirituous liquors, or any other goods whatsoever, into or from this kingdom, or hovering upon the coasts thereof, and where the owner or proprietor, or other person, shall be entitled to any bounty or allowance according to the tonnage of any ship or vessel, and in all other cases whatsoever where the tonnage and burthen of any ship or vessel shall be necessary to be ascertained and known by any Act or Acts of Parliament made, or hereafter to be made, concerning the revenues of customs, excise, or salt duty, the rule for admeasuring such ships or vessels shall be as follows; that is to say, the length shall be taken on a straight line along the rabbet of the keel of the ship, from the back of the main stern post to a perpendicular line from the fore part of the main stem under the bowsprit, from which substracting three-fifths of the breadth, the remainder shall be esteemed the just length of the keel to find the tonnage; and the breadth shall be taken from the outside of the outside plank in the broadest place of the ship, be it either above or below the main whales, exclusive of all manner of doubling planks that may be wrought upon the sides of the ship, then multiplying the length

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of the keel by the breadth so taken, and that product by half the breadth, and dividing the whole by 94, the quotient shall be deemed the true contents of the tonnage." By s. 2, the Act was not to alter the method of measuring coal vessels or vessels employed in the white herring fishery. It will be noticed that the words "tonnage" and "burthen" are used in the Act as if they denoted the same thing. By s. 3 of 26 Geo. 3, c. 60 (1786), the provisions of 7 & 8 Will. 3, c. 22, were extended, and every vessel having a deck, or being of the burthen of fifteen tons or upwards, belonging to His Majesty's subjects in Great Britain, &c., and the Colonies, was required to be registered, and a certificate obtained in the form set out in the Act. This form shews what particulars of the vessel had to be given, and with regard to tonnage uses these words: "—— admeasures (burthen) tons." Sect. 14 prescribes the method to be adopted for ascertaining the tonnage of vessels when afloat, which is arrived at by multiplying the length, measured as directed by the Act, by the breadth, and the product by the half-breadth, and dividing by 94.

When steam-vessels were introduced the rules prescribed for sailing vessels were not suitable for ascertaining the true tonnage of steamers, and in 1819 the Act 59 Geo. 3, c. 5, was passed, which determined how the tonnage of steam-vessels was to be ascertained. The length of the engine-room was to be deducted from the length of the vessel, and the calculation then proceeded in a similar way to that for sailing vessels. The effect of this was to give the tonnage of the cargo-carrying spaces in a steam-vessel.

The Act for the encouragement of British Shipping and Navigation, 6 Geo. 4, c. 109, and the Act for registering British vessels, 6 Geo. 4, c. 110 (1825), preserved the exemption from registration of British vessels under fifteen tons burden, used in navigating in British rivers and upon British coasts, and prescribed similar rules to those then in force for measuring vessels and ascertaining their tonnage. The certificate of registry was to be in a form set out in the second Act, which required the burthen of the ship to be set out in tons, and it appears to follow that the number of tons was that

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ascertained according to the provisions of the Act. Similar Acts, with amendments, were passed in 1833 (3 & 4 Will. 4, c. 54 and c. 55), but the above-mentioned exemption and mode of measurement remained the same.

As the mode of ascertaining the tonnage of vessels under 3 & 4 Will. 4, c. 55, and previous Acts, led to inaccurate conclusions, it was felt desirable that a change should be made, and a committee was appointed in 1834 to consider the subject, and, as a result of their recommendations, the Act 5 & 6 Will. 4, c. 56 (1835), was passed. This Act recites the Act of 1833, and then recites as follows: "Whereas it is considered that the capacity of a ship is the fairest standard by which to regulate its tonnage, that internal measurements will afford the most accurate and convenient method of ascertaining that capacity, and that the adoption of such a mode of admeasurement will tend to the interests of the ship-builder and the owner, as well as to the proper collection of the dues which by law are payable on tonnage; and it is expedient to alter and amend the law in this respect." It then proceeds to lay down an elaborate mode of measurement in order to ascertain the tonnage of sailing vessels, steam-vessels, and laden vessels. In steamers the cubical contents of the engine-room were to be deducted from the total tonnage in order to arrive at the true register tonnage. Sect. 3 of the Act is as follows: "And be it further enacted that the tonnage or burthen of every ship belonging to the United Kingdom, ascertained in the manner hereinbefore directed, shall, in respect of any such ship which shall be registered after the commencement of this Act (except as hereinafter excepted), be inserted in the certificate of the register thereof, and be taken and deemed to be the tonnage or burthen thereof for all the purposes of the said recited Act." Tonnage and burden are treated as having the same meaning. The recital shews that the object of the Act was partly to take away the temptation to build vessels of such a form that they might measure less than their true burden.

In the Act for the general regulation of the Customs, 8 & 9 Vict. c. 86, passed in 1845, s. 138 provided that the tonnage or burden of every British ship, within the meaning of the Act,

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should be the tonnage set forth in her certificate of registry, and that the tonnage or burden of every other ship should, for the purposes of the Act, be ascertained in the same manner as the tonnage of British ships was ascertained. Here again the words "tonnage" and "burden" are used as if they had the same meaning.

The Merchant Shipping Act, 1854, which amended and consolidated the Acts relating to merchant shipping, introduced further improvements into the mode of measuring the tonnage of vessels; though it is well known that the tonnage arrived at by this mode is generally much less than the quantity of tons weight of cargo which a ship can carry. Sect. 19 contained an exemption from registry of vessels not exceeding fifteen tons burden in similar words to that contained in s. 3 of the Act of 1894, which consolidates the Acts up to that date. The limitation of the shipowners' liability, which had been introduced by earlier Acts, in particular by 53 Geo. 3, c. 159 (1813), was, in the cases mentioned in the Act of 1854, to be the value of the ship and freight, provided that in case of loss of life or personal injury to passengers the value of ship and freight was not to be taken at less than 15*l.* per registered ton; but, by the Merchant Shipping Act Amendment Act, 1862, the limit was to be 8*l.* per ton for the loss of ship or goods, and 15*l.* per ton for loss of life or personal injury, either alone or jointly with damage to ship or goods.

This examination of the previous Acts brings me to the Act of 1894, and has led me to the conclusion that in the legislation from first to last, prior to this Act, the words "burden" or "tons burden" have been used with a meaning which was the same as that of the tonnage of a vessel ascertained in the manner directed by the Acts for the time being in force—that is to say, the registered tonnage. The Act of 1894 is an Act consolidating the enactments relating to merchant shipping, and, in order to ascertain the meaning of the words "tons burden," as used therein, it is legitimate to ascertain whether these words have been used in any special sense in prior Acts of Parliament dealing with the same subject (see Maxwell's Interpretation of Statutes, 3rd ed. 1896, p. 50). This I have shewn to

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have been the case, and I am of opinion that these words in s. 3 were used in reference to the tonnage of a vessel measured in accordance with the provisions of the Act and the tonnage regulations thereof. The words "tons burden" are to be found in other sections of the Act (see ss. 90, 92, 103, 622, and 625), but their use in those sections is not in any way inconsistent with the above meaning. They are also to be found in that part of the Act headed "engagement of seamen," where the words "tons burden" and "registered tonnage" are clearly used in the same sense, for, when dealing with the necessity of entering into an agreement with the crew, a distinction is drawn in the requirements of the Act according to the tonnage of a home trade vessel, and the words in s. 113 are: "ships of less than eighty tons registered tonnage," whilst the words in s. 119 are: "ship of more than eighty tons burden."

It is further to be observed that the meaning placed upon these words by the defendants would give rise to great difficulty in fixing the exact burden of a vessel. The quantity which a vessel can carry depends in part on the season of the year and on other variable circumstances, whereas the measurements give definite results. The Act 61 & 62 Vict. c. 44, and rule 8*a* in the 2nd schedule thereof, do not in my judgment affect this case. I find, therefore, that the *Brunel* did not exceed fifteen tons burden within the meaning of s. 3 of the Act of 1894.

Then s. 503 limits the liability of the owners of a ship, British or foreign, in the case of such a claim as that of the defendants, to 8*l.* for each ton of their ship's tonnage, which, in the case of a steamship, is to be her gross tonnage without deduction on account of engine-room, and, in the case of a sailing ship, is to be her registered tonnage, with a proviso that there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use which is certified under the regulations scheduled to the Act with regard thereto.

It was not argued before me that, as the *Brunel* was not in fact registered, although she did not exceed fifteen tons burden, her owners were not entitled to limit their liability, no doubt

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because the combined effect of ss. 72, 77, 503, and 508 appears to be to entitle the owners of a British vessel, which is exempted from registry under s. 3, and has not, therefore, been registered, nor had her tonnage ascertained for the purpose of registry, to limit their liability by an amount calculated upon the vessel's tonnage, ascertained by measuring her according to the Act and the tonnage regulations thereof.

The tonnage of the *Brunel* for the purpose of the calculation is 35·99 tons, and as, in the circumstances, there is no certificate as to crew space, the amount thereof cannot be deducted owing to the express provisions of s. 503 and Sched. VI. to the Act. In the result there will be the usual decree of limitation of liability in an amount calculated at 8*l.* per ton on 35·99 tons, and the costs of the suit must, as usual, be paid by the plaintiffs.

Solicitors for plaintiffs: *Robins, Hay, Waters & Hay, for D. Travers Burges, Bristol.*

Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

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[IN THE CONSISTORY COURT OF LONDON.]

1898

*Nov.* 3.

## THE VICAR AND CHURCHWARDENS OF ST. JAMES THE LESS, BETHNAL GREEN *v.* THE PARISHIONERS OF THE SAME.

*Ecclesiastical Law—Jurisdiction—Faculty—Erection on Churchyard closed for Burials—Schools and Parish Hall to be used for Mission Services—Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Meaning of "Enlargement of Church, Chapel, Meeting-house, or other Places of Worship."*

The 3rd section of the Disused Burial Grounds Act, 1884, provides that after the passing of that Act it shall not be lawful to erect any buildings upon any disused burial ground (defined by that Act to mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the Burial Acts, 1852 and 1853), except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship:—

*Held*, that the Ordinary had, without infringing the above section, jurisdiction to authorize by faculty the rebuilding and extension by way

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of enlargement of schools and a parish hall erected on a disused burial ground within the Act, and which were used for mission services for adults and children, and which it was intended to use when rebuilt for the same purposes supplemental to the services in the parish church, and to meet the growing wants of the parish.

THIS was a cause of faculty instituted on behalf of the Rev. J. E. Watts, the vicar, and William Harvey and Henry Christian Wheatley, the churchwardens of the parish church of St. James the Less, Bethnal Green, in the diocese of London, for the purpose of obtaining a faculty authorizing (1.) the taking down of a building erected on a portion of the churchyard of the parish closed for burials, and which had been used for religious services for adults and children as well as for a Sunday and day school, and the rebuilding and extension of the same, partly on the same site and partly on the site of the adjoining churchyard: the new building to be used for mission and other religious services, under the authority of the vicar of the parish, as a parish hall, and as a Sunday school and day schools, and to be erected on arches and with an impervious flooring on the top of the arches; and (2.) the turfing, planting, and laying out of the churchyard as a recreation ground.

The suit now came for hearing before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.).

The vicar of St. James the Less and two other witnesses were examined in support of the petition. The result of their evidence appears from the judgment.

*Arnold Statham*, for the petitioners. The churchyard of St. James the Less, Bethnal Green, has been closed for burials by Order in Council passed under the powers of the Burial Acts, 1852 and 1853. It is, therefore, a disused burial ground to which the Disused Burial Grounds Act, 1884, applies; but the erection on it of the proposed building will in nowise contravene that Act, as it is clear from the evidence given on behalf of the petitioners that that building when erected will be the enlargement of an existing building now in use for the purpose of holding mission and other religious services—that is, for the purposes of a place of worship

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within the exception in the 3rd section of the Act. (1) There being, then, no prohibition under the Act of 1884 against the erection of the proposed building on part of the churchyard, and the building when erected being intended to be used for ecclesiastical as well as secular purposes under the sanction of the vicar of the parish (*In re Bettison* (2)), the Court has clearly jurisdiction to grant the faculty as prayed, and ought in its discretion to do so, having regard to the need which exists for such accommodation for church purposes in the parish. [He also referred to s. 4 of the Open Spaces Act, 1887 (50 & 51 Vict. c. 32).]

No question arises as to the other matters in respect of which the faculty is prayed. They are all matters with respect to which a faculty ought to issue.

The grant of the faculty was not opposed.

DR. TRISTRAM. The churchyard of St. James the Less, Bethnal Green, has been wholly closed for burials under an Order in Council, and at the east end of it there is a building, erected before the passing of the Disused Burial Grounds Act, 1884, which has been and is still used as a place for holding mission and other religious services for adults and children in connection with the parish church, as well as for Sunday schools and for meetings for church and parochial purposes, and as a boys' day school. It can accommodate about 150 persons. It appears by the evidence that there has been most excellent church work done in the parish, and that the present accommodation required for the parishioners who are anxious to attend the services in the church and the mission-room or schoolroom

(1) By ss. 2 and 3 of the Disused Burial Grounds Act, 1884, it is provided (s. 2): "In this Act 'a disused burial ground' shall mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the provisions of the said recited Acts" (15 & 16 Vict. c. 85 and 16 & 17 Vict. c. 134). Sect. 3: "After the passing of this Act it shall not be lawful to erect any buildings upon any disused burial ground except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship." [The definition of "disused burial ground" given by the Disused Burial Grounds Act, 1884, is extended by the Open Spaces Act, 1887, s. 4.]

(2) (1874) L. R. 4 A. & E. 294.

1898

ST. JAMES THE LESS, BETHNAL GREEN (VICAR OF) *v.* PARISHIONERS OF SAME.

Dr. Tristram.

is insufficient. To supply this want, and to meet the wishes of the parishioners, an application, with the unanimous vote of the parish vestry, is now made to the Court for a faculty authorizing the vicar and churchwardens of the parish, after having taken down the building I have referred to, to erect on its site and on a portion of the churchyard adjoining it a larger building in substitution for, and as an enlargement of the present building, capable of accommodating 500 instead of 150 persons, for the purpose of using it as a mission-room as well as for religious and parochial meetings, and as a school-room. It is intended that the proposed building should be erected on piers, and that the flooring of it should be raised six feet or more above the level of the ground, so as to render the removal of any human remains buried there unnecessary, and with a view of supplying a shelter for children and others underneath the building. The attention of the Court has been directed by Mr. Arnold Statham to s. 3 of the Disused Burial Grounds Act, 1884, and it was submitted by him that the erection of this proposed building under the special circumstances of this case would not contravene the provisions of that section. In the opinion of the Court, the section in question would not be contravened by what is intended to be done, as by the exception in it it is lawful to build upon a disused burial ground (defined by that Act to mean a burial ground closed for burials under an Order in Council as this churchyard has been) for the purpose of enlarging a church, chapel, or meeting-house, or other place of worship; and the Court holds that the building proposed to be erected here comes within this exception. The present building, for which the new building is to be substituted, having been heretofore and still used as a place of worship, the erection of such new building is practically an enlargement of the existing one. The Court is of opinion that a faculty may issue as prayed without contravening s. 3 of the Disused Burial Grounds Act, and will also authorize by faculty the laying out of the churchyard as a garden or recreation ground.

Solicitors for petitioners: *Lee, Bolton & Lee.*

C. F. J.

## In the Goods of HARPER.

1898
Dec. 19.

*Administration—Disappearance of Person entitled—Necessity for Citation.*

Where upon an application by the one surviving brother of an intestate, who died in 1895, for administration of his estate, it appeared that the intestate's father, who, if alive, was entitled to administration, had deserted his wife in 1866 and had not since been heard of, the Court directed that the father should be cited.

Application under s. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), by a member of the firm of Messrs. Simpson, Cullingford & Co., as attorney for Arthur Charles Harper, for administration to the estate of his brother Alfred William Harper.

Alfred William Harper died in 1896, in England, in a lunatic asylum, a bachelor and intestate. The applicant lived in the Straits Settlements. The estate was of the value of 250*l.*, of which 80*l.* was due for the funeral expenses and maintenance of the intestate, and the costs of the official solicitor who had taken charge of the estate under s. 111 of the Lunacy Act, 1890 (53 & 54 Vict. c. 5).

The mother, the other brothers, and the sisters of the intestate had predeceased him, and his father had not been heard of since 1866. He had deserted his wife in that year, and the applicant deposed that he knew from his mother, who died in 1895, that, from the time of his leaving her till then, she had never heard from him, and believed him to be dead.

Leave to cite the father had been refused in the registry on the ground that, if alive, he and not the applicant was entitled to administration.

*R. H. Pritchard*, in support of the application. The practice is not as supposed. The father, if alive, ought to be allowed an opportunity of asserting his right to administration.

[Gorell Barnes J. referred to *In the Goods of Sarah*

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*Moore* (1), in which the husband of an intestate had been cited and, on his not appearing, passed over, and a grant made to his son.]

The father's death can hardly be presumed, as in this proceeding it is not his estate which is being administered: *In the Goods of Amelia Clark.* (2) The grant might perhaps be made to the applicant without citing the father, under s. 73: *In the Goods of Shoosmith* (3); or, on his swearing that he "believes himself to be the sole next of kin": *In the Goods of Reed.* (4) Citation was recently directed under similar circumstances by the President in *In the Goods of Noble.* (5)

GORELL BARNES J. directed that the father of the intestate should be cited.

Solicitors: *Simpson, Cullingford & Co.*

(1) [1891] P. 299.
(2) (1889) 15 P. D. 10.
(3) [1894] P. 23.
(4) (1874) 29 L. T. (N.S.) 932.
(5) On this motion, heard on Nov. 11, 1898, in which Archibald Noble claimed administration of the estate of his mother, Elizabeth Noble of Barrow-in-Furness, on its appearing that the intestate had been deserted by her husband John Noble in 1888, the President directed that John Noble should be cited at his last known address.

*R. H. Pritchard*, counsel; *Redpath, Holdsworth & Marshall*, solicitors.

H. D. W.

## HARROP *v.* HARROP.

1899
*Jan.* 16.

*Divorce — Co-respondent — Intervention — Answer containing no Claim for Cross-relief—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 2.

A husband, in his answer to a petition by his wife for dissolution of marriage, made a counter-charge against her of adultery with a specified person, without claiming cross-relief, or "such further or other remedy as the nature of the case may require":—

*Held*, that the Court had no power to allow the alleged adulterer to intervene.

*Wheeler* v. *Wheeler and Rhodes*, (1889) 14 P. D. 154, considered.

Motion by Robert R. King, who had been charged by the respondent in his answer with adultery with the petitioner, for leave to intervene. The answer prayed only that the Court would dismiss the petition. It did not claim cross-relief, or "such further or other remedy as the nature of the case may require."

*Pridham Wippell*, in support of the application. It would be unfair to the applicant, who is accused of adultery, not to allow him to intervene, and defend his character. A similar application was granted by Sir C. P. Butt in *Wheeler* v. *Wheeler and Rhodes*. (1) In that case the answer contained a claim for general relief; but the judge does not seem to have considered that circumstance material. (2) If it was not material, the case is a direct authority in the applicant's favour. A question of jurisdiction cannot, it is submitted, depend upon a point of pleading.

*Priestley*, for the petitioner, supported the application.

*Barnard*, for the respondent. This Court has no power to allow the intervention. Before the Matrimonial Causes Acts, a man alleged to have been guilty of adultery could only be proceeded against at common law for crim. con. There was no means of joining him in an ecclesiastical suit for separation a mensâ et thoro. Such a person only became liable to be

(1) 14 P. D. 154. (2) 14 P. D. at p. 156.

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proceeded against in a divorce petition under those Acts, and the practice and the powers of the Court as to the circumstances under which he can be joined are strictly defined by s. 28 of the Act of 1857 and s. 2 of the Act of 1866. (1) The latter Act does away with the necessity for a cross-petition, but otherwise leaves the law as before. The ratio decidendi of *Wheeler* v. *Wheeler and Rhodes* (2) was that the answer in that case contained what was practically a counter-claim for dissolution, and that the applicant was, therefore, liable to be made a co-respondent.

GORELL BARNES J. This is an application by a person, who has been charged with adultery by the respondent in his answer, for leave to intervene. The answer does not claim cross-relief, but merely that the Court will be pleased to dismiss the petition. The application seems to me a very reasonable one, and I should be glad to grant it; but the question is, Have I the power? This depends on the construction of some sections of the Matrimonial Causes Acts.

Under the ecclesiastical practice, intervention was not allowed. It was under the Matrimonial Causes Act, 1857, that a person accused of adultery first became liable to be made a co-respondent. The 28th section enacts that upon any petition presented by a husband for the dissolution of his marriage he shall make the alleged adulterer a co-respondent, and gives the Court power upon any petition presented by a wife to direct

(1) By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 28, "Upon any such petition presented by a husband, the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless, on special grounds to be allowed by the Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage, the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent."

By the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 2, "In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground in the case of such a suit instituted by a husband, of his adultery, cruelty, or desertion, or, in case of such a suit instituted by a wife, on the ground of her adultery or cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief."

(2) 14 P. D. 154.

that the person with whom the husband is alleged to have committed adultery be made a respondent, and the 31st section provides that it shall not be bound to pronounce a decree if it shall find that the petitioner has been guilty of adultery. Had the answer in this case been put in under this Act alone, it could scarcely have been disputed that this application must have failed, as there is no cross-petition by the respondent for the dissolution of his marriage on the ground of the adultery of the petitioner.

The 2nd section of the Matrimonial Causes Act, 1866, says: "In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground in the case of such a suit instituted by the husband, of his adultery, cruelty, or desertion, or in case of such a suit instituted by a wife on the ground of her adultery or cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled, in case he or she had filed a petition seeking such relief." The section seems intended to prevent the necessity for a cross-petition, by allowing the whole question to be determined on a petition and answer; but I do not think that it has the effect of enabling the applicant to intervene.

Since the Act of 1866 the question has arisen in three cases. In *Grieve* v. *Grieve* (1) and *Carew* v. *Carew* (2) persons charged with adultery by the Queen's Proctor sought to intervene, but their applications were refused. I think the ground of those decisions is that there was no power to allow them, as intervention is only permitted in the specific cases which are provided for under the 28th section of the Act of 1857. The husband seeking to obtain a dissolution of marriage is bound to make the adulterer a co-respondent. The Court may make the adulteress a respondent when the wife seeks similar relief. If the argument for the applicant is right, these specific provisions are superfluous.

In *Wheeler* v. *Wheeler and Rhodes* (3) a person charged, like the applicant, by a respondent with adultery, applied for

(1) [1893] P. 288. (2) [1894] P. 31.

(3) 14 P. D. 154.

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leave to intervene. In that case the answer, though it did not in terms claim cross-relief against the petitioner, claimed "such further or other relief as to the Court may seem fit," and, this being so, the judge held that it was in effect a cross-petition, and allowed the application, basing his decision on this very ground, and, as I read his judgment, expressly declining to decide the point now raised. My impression is that he thought that the respondent could have been compelled to cite the applicant, and that it did not much matter whether he was cited or allowed to intervene.

The effect of the two sections is, I think, that where the answer of the respondent is, as in this case, merely an answer, the Court cannot make a decree for dissolution. This can only be done where the answer contains a claim for cross-relief, and in that case the respondent, if a husband, is bound to make the alleged adulterer a co-respondent, as he would have had to do if he had presented a cross-petition. Here, as the answer in its present form contains no claim for cross-relief, the respondent, in order to entitle himself to a decree, must have applied for leave to amend and to make the applicant a co-respondent, and the case must have been adjourned.

For these reasons I hold that, though the application is in itself a reasonable one, I have no power to grant it.

Solicitors: *Hamlin, Grammer & Hamlin; Helliwell, Harby & Evershed; Hind & Robinson.*

H. D. W.

## HARTOPP *v.* HARTOPP AND AKHURST.

1898
*Nov.* 7;
*Dec.* 19.
1899
*Jan.* 27.

*Divorce—Variation of Settlements—Interest of Children—Wife's Power of Appointment to Husband—Matrimonial Causes Act*, 1857 (20 & 21 *Vict.* c. 85), s. 45—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict.* c. 61), s. 5.

By the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

The principle of the decisions on the section is that, where the breaking up of the family life has been caused by the fault of the respondent, the Court ought to place the petitioner and the children in a position as nearly as circumstances will permit the same as if the family life had not been broken up.

Where, therefore, a wife, whose marriage had been dissolved on the ground of her adultery, had under her marriage settlement a power of appointment in her husband's favour, if he should survive her, over a fund, which, apart from the exercise of the power, would upon her death have vested in the children of the marriage, and this was the husband's only interest in his wife's property under the settlement, the Court held that as it was reasonable to suppose that, if the family life had continued, she would have exercised the power in his favour, the income should, after her death, be paid to him during his lifetime.

*Noel* v. *Noel*, (1885) 10 P. D. 179, *Crisp* v. *Crisp*, (1872) L. R. 2 P. & M. 426, *Forsyth* v. *Forsyth*, [1891] P. 363, *Pollard* v. *Pollard*, [1894] P. 172, and *Hipwell* v. *Hipwell*, [1892] P. 147, considered.

APPLICATIONS to amend the recommendations of the registrar on a petition presented by the petitioner for the variation of his and the respondent's marriage settlement.

The report was in the following terms:—

On June 13, 1898, the decree nisi for dissolution of marriage was made absolute. There are now living eight children of the marriage, aged from seventeen to four.

By an indenture of settlement bearing date August 12, 1878, made in contemplation of the said marriage, certain trust funds and interests are held by the trustees in trust for the respondent for life, and on her death for the children if she

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should appoint, and in default of appointment for the children equally. There are further trusts in the event of no child of the marriage attaining the age of twenty-one years. It is therein provided that, if the respondent shall survive the petitioner, it shall be lawful for her, after the death of the petitioner, but without prejudice to any appointment in favour of the children of the said marriage, to appoint in favour of a future husband and the children of a second marriage to the extent of one-third of the trust funds, in the event of more than one child, issue of the marriage between the petitioner and the respondent, attaining the age of twenty-one years.

No property was brought into settlement by the petitioner.

In the event of the petitioner surviving the respondent, the respondent has power to appoint by will a sum not exceeding 500*l.* a year to the petitioner, but in default of the exercise of this power the petitioner has no interest in the trust funds on the death of the respondent. Her interest in this fund comes to her on her mother's death under the will of her grandfather. It consists of 10,452*l.* in Consols, producing 277*l.* a year.

Counsel on behalf of both parties and the trustees of the said settlement attended before me, and it was agreed that the respondent's present income is 997*l.* per annum, to be increased to 2274*l.* on the death of her mother, who is now seventy years of age, and that the income of the petitioner—apart from any profit derived from his business as a South African merchant—is about 200*l.* a year.

It is sworn by the petitioner that since the commencement of his business in partnership in January, 1895, he has only been able to draw 409*l.* 6*s.* 10*d.*, and that there is little prospect of any further receipts owing to the depression of business in South Africa.

The petitioner attended before me pursuant to notice, but counsel on behalf of the respondent did not cross-examine him.

If the petitioner is charged with the average receipts from the business, his income will be about 340*l.* a year.

It was contended by counsel on behalf of the petitioner that the case of *Noel* v. *Noel* (1) is an authority for appropriating

(1) 10 P. D. 179.

half the respondent's income for the benefit of the petitioner and the children of the marriage, regardless of the amount of the petitioner's income.

It is submitted that, although in the case of *Noel* v. *Noel* (1) the trustees were ordered to pay half the income arising from the wife's trust funds to her husband, it was after consideration of their several incomes and other circumstances of the case, and that the decision is not an authority for the general proposition. But, in this case, having regard to the number of children, it is submitted that it would be right that the Court should order that, until the death of the mother of the respondent, the trustees should pay to the petitioner half the income arising from the trust funds, and from and after the death of the respondent's mother and during the lifetime of the respondent, the annual sum of 1000*l.*, and on the death of the respondent the annual sum of 500*l.*, and further order that the respondent should not be at liberty to appoint in favour of a second husband, whom she may marry during the petitioner's lifetime, nor in favour of children of the second marriage during the lifetime of the petitioner, and that the respondent's power of appointment amongst the children of the marriage between the petitioner and respondent be extinguished, and that the trustees be at liberty to exercise the power of advancement in favour of the children without the consent of the respondent, provided that the loss of capital be borne proportionately by the petitioner and the respondent.

*Deane*, *Q.C.*, and *Barnard*, for the petitioner. The report should be varied by allotting to the petitioner not merely 1000*l.* a year, but half the income to which the respondent will become entitled upon her mother's death, in accordance with the order made in *Noel* v. *Noel*. (1) He is willing that two-thirds of this sum should be paid to him on account of the children of the marriage. The conduct of the respondent has been very profligate. The income payable to her under the will should be paid to him after her death, for, if the marriage

(1) 10 P. D. 179.

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had continued, she would almost certainly have exercised the power of appointment in his favour.

*Inderwick*, Q.C., and *Priestley*, for the respondent. No general rule is to be found in *Noel* v. *Noel* (1) and the subsequent decisions, which are simply examples of the exercise of judicial discretion under the 45th section of the Matrimonial Causes Act, 1857, and the 5th section of the Matrimonial Causes Act, 1859. (2) The evidence shews that the respondent has given large sums to the petitioner, that he has received considerable sums from other relations, and that he will come into money on his mother's death. Should he lose all in speculation, the children of the marriage may be left penniless. The respondent should, at least, have power to appoint among them, if she survives the petitioner, and it would be only fair that her power to appoint to a second husband and children should be retained, though no such appointment should take effect till after the petitioner's death.

*C. F. Norton*, and *Wilcock*, for the guardian ad litem of the children. The Court ought not to deal with the fund which is subject to the power of appointment. The children have an absolute vested interest in the fund, subject to the life interest of the respondent, unless she should exercise the power. There is no precedent for such a variation of a settlement. An unexercised power of appointment is not "property" within

(1) 10 P. D. 179.

(2) By the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45, "In any case in which the Court shall pronounce a sentence of divorce or judicial separation for adultery of the wife, if it shall be made to appear to the Court that the wife is entitled to any property either in possession or reversion, it shall be lawful for the Court, if it shall think proper, to order such settlement as it shall think reasonable to be made of such property or any part thereof, for the benefit of the innocent party, and of the children of the marriage, or either or any of them."

By the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

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the meaning of the section: *Ex parte Gilchrist, In re Armstrong.* (1)

*Bargrave Deane, Q.C.*, in reply. The interest of the children is contingent only. A reversionary interest in settled estate has been held by Lord Langdale M.R. to pass as "property" under a will: *Jones* v. *Skinner.* (2)

*Cur. adv. vult.*

1899. Jan. 27. GORELL BARNES J. delivered the following written judgment:—In this case the marriage between the petitioner and respondent has been dissolved on the ground of the respondent's adultery, the decree absolute having been pronounced on the husband's petition on June 13, 1898, and the petitioner was given the custody of the children of the marriage.

The husband having presented a petition for the variation of an ante-nuptial settlement made on August 12, 1878, with the sanction of the Court of Chancery, the respondent being at that time a ward of Court, the registrar has made his report, recommending as follows: [The learned judge read the recommendations. (3)]

On motion before me the husband desired to have the report varied by increasing the amount to be paid to him after the death of the respondent's mother from 1000*l.* per annum to one-half of the annual income of the trust funds. He was willing, however, that the amount to be paid to him from time to time should be paid to him as to one-third for his own use and as to two-thirds for the benefit of the children. The increase was, however, opposed by the respondent. After due consideration of all the circumstances of the case, and especially of the fact that the petitioner has to support and bring up the children, I am of opinion that the 1000*l.* should be increased to one-half the annual income of the trust funds, with a direction that the amount to be paid is to be applied in manner aforesaid.

The respondent sought to have the report varied in so far as it deals with her power of appointment in favour of any future

(1) (1886) 17 Q. B. D. 521. (2) (1835) 5 L. J. (N.S.) (Ch.) 87.
(3) See ante, p. 67.

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husband and children of a future marriage; but I am of opinion that the report should be confirmed on this point. If the power of appointment can be read as giving the respondent power to appoint in favour of any husband she may marry during the petitioner's lifetime and of any children of a future marriage born in his lifetime, it is not desirable that the respondent should be able to exercise the powers in question to the detriment of her present children in a manner which she could not have done had she remained the wife of the petitioner. I may refer upon this point to the observations of Lord Hannen in the case of *Noel* v. *Noel*. (1)

The respondent also objected to the extinguishment of her power of apportionment among the children of the marriage, and to the exercise by the trustees of the power of advancement in favour of the children without her consent; but, as she will no longer have charge of the children, she has not the same opportunity of exercising a judgment as to the propriety of making any particular disposition of her property among them, or as to the exercise of the powers of advancement as if she had continued in charge of them, and the report must be confirmed on this point also.

The principal difficulty in the case arose from an application by the petitioner on the motion that the settlement be varied by ordering that the petitioner should be entitled to receive, after the respondent's death, the income derived from a fund coming under the will of the respondent's grandfather referred to in the settlement, which is now represented by a sum of about 10,000*l*. in Consols. Under the settlement the respondent takes a life interest in it, and after her death it goes to the children of the marriage, subject to a power given by the settlement to the respondent to appoint by will or codicil the annual income of this fund in favour of the petitioner for his life. If this power should not be exercised, the petitioner has no interest under the settlement in the settled property.

It was objected by the respondent that the Court had no power to make such an order, as it would affect the interests of the children under the settlement, and the case was adjourned

(1) 10 P. D. 179, at p. 182.

in order that a representative of the children should appear and argue the matter on their behalf. A guardian ad litem of the children was accordingly appointed, and the case was reargued on this point. Counsel on behalf of the children took the same objection, and relied on the cases of *Crisp* v. *Crisp* (1), *Forsyth* v. *Forsyth* (2), and *Pollard* v. *Pollard*. (3) The petitioner's counsel maintained that the Court has power to make the order prayed, and relied on the 45th section of the Matrimonial Causes Act, 1857, and the 5th section of the Matrimonial Causes Act, 1859. I do not propose to comment on the 45th section of the first Act, but to base my judgment on the 5th section of the second Act. The said 5th section is as follows: "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

The section is in very general terms, and under it the Court is expressly given power to make such orders with reference to the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court may seem fit. I feel little doubt that under this section the Court has power to make the order prayed for, and, indeed, counsel for the children seemed to feel the difficulty of maintaining that the language of the section is not sufficient to give the Court this power; but it was urged that, in the cases above mentioned, a construction has been placed upon the section to the effect that the Court has no power to vary a marriage settlement so as to deprive the children of the marriage of any interest secured to them by the settlement, and that the petitioner is asking the Court to make an order which will deprive the children of the petitioner and respondent of interests secured to them by the settlement in question.

(1) L. R. 2 P. & M. 426. (2) [1891] P. 363. (3) [1894] P. 172.

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Now, the guiding principle which will be found running through the cases is, in my opinion, this: Where the breaking up of the family life has been caused by the fault of the respondent, the Court, exercising its powers under the above section, ought to place the petitioner and the children in a position as nearly as circumstances will permit the same as if the family life had not been broken up. It follows that where the trust funds are settled, as is usual, upon the parents successively, or upon one of them for life, with remainder to the children, the Court, while it might extinguish the whole or a part of the guilty parent's life interest and his or her power of appointment, if any, amongst the children, would not interfere to deprive the children of those interests to which they are entitled under the settlement. In such cases, whether the home is broken up or not, the children, on attaining the age fixed by the settlement, or sometimes, in the case of daughters, on their marrying, have interests which will certainly come to them as soon as the prior life interests end. *Crisp* v. *Crisp* (1) was a case which may have been determined from this point of view, though it is possible that, if that case had been heard since the passing of the Judicature Acts, the Court might have considered it had power to make the order agreed upon had it chosen to do so. In *Forsyth* v. *Forsyth* (2) the children who might attain twenty-one or marry became absolutely entitled to the trust funds after the death of the respondent. In *Pollard* v. *Pollard* (3) the settlement gave the wife upon the death of her husband a power of appointment in favour of a second husband and the children of a second marriage, and the wife, who had obtained a divorce against her husband, sought to have the settlement varied so as to enable her to exercise the power before her husband's death, but the President declined to do so. He did not, however, determine that he had no power to do so. In *Hipwell* v. *Hipwell* (4) the children's reversionary interests were affected by an order that the petitioner's costs should be paid out of the corpus.

In the present case the children become entitled to the fund

(1) L. R. 2 P. & M. 426.
(2) [1891] P. 363.
(3) [1894] P. 172.
(4) [1892] P. 147.

aforesaid on attaining twenty-one, or, if daughters, on marrying, subject, however, to the wife's life interest, which will have been partially dealt with by the order of the Court, and subject to her power of appointment aforesaid; so that, if the respondent should exercise that power, to the extent to which she does so, the benefit to be derived by the children from the fund is postponed till after their father's death; that is to say, the children's interests vary according as the power is exercised or not. If the family life had continued, it is most natural to expect, in the petitioner's circumstances and as he has no interest in his wife's money conferred by the settlement, except so far as she might give him a benefit by the exercise of the power in question, that if she died before him she should leave a will exercising the power in his favour.

The position, then, is that if no order be made the children will, after what has happened, almost certainly obtain their full interests after their mother's death, whereas if the marriage had continued in the ordinary way they would most likely only have obtained those interests after the death of both parents. At any rate, it may be said that the children's interests as conferred by the settlement are not absolute, but are liable to be affected by the exercise of the power in question. There is a state of uncertainty which, in the position of the parties to this suit, it is reasonable to expect would have been determined in favour of the husband had the family life continued, and in my opinion the Court has power, and it is reasonable, to determine it in his favour in the circumstances which have happened.

The trustees of the settlement did not appear and argue the points before the Court, but Mr. Inderwick stated that he was authorized on their behalf to say that they did not desire to be heard.

In the result the sum of 1000*l.* must be increased to one-half of the respondent's income after her mother's death during the respondent's lifetime, and one-third of the amounts to be paid to the petitioner from time to time during his life is to be paid to him for his own use, and two-thirds of the said amounts are to be paid to him for the use of the children while he has

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the custody of them, and as each child attains twenty-one or, if a daughter, marries, the proper share of the said two-thirds applicable to such child, according to the number of the children, shall be paid to him or her, and the income of the fund coming under the will of the grandfather of the respondent, not exceeding 500*l.* a year, must be paid, after the respondent's death, and subject to any interests prior to hers, to the petitioner during his lifetime. The report will be varied in this way, and in other respects be confirmed.

Solicitors: *Pollock & Co.; Layton, Sons & Lendon; Clarke & Calkin.*

H. D. W.

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1898
*Dec.* 5, 6, 13;
1899
*Jan.* 26.

## THE SNARK.

*Admiralty—Collision—Sunken Wreck in navigable River—Liability of Owner for Negligence of Contractor.*

A dumb barge belonging to the defendants, without negligence on their part or that of their servants, was sunk in the fairway of the river Thames. They employed a proper person to conduct the salvage operations necessary to raise her, and, for that purpose, placed him in possession and control, but, owing to the guard-vessel placed by him to mark the submerged barge having been negligently allowed to get out of position, the plaintiff's steamship coming up the river, without negligence, ran upon the wreck and sustained damage:—

*Held*, by Gorell Barnes J., that the defendants were personally liable, as they had a duty to perform, namely, to use reasonable care to warn other vessels of the position of the wreck, and could not escape from the responsibility attaching to them by delegating the discharge of the duty to a contractor.

*Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, followed.

ACTION in personam of damage by collision.

The plaintiff was Adolph Kirsten, owner of the steamship *Vesta*, the defendants were A. and P. Keen, owners of the dumb barge *Snark*.

The question was whether the defendants were liable as principals for damage sustained by the plaintiffs' steamship through the negligence of a contractor employed by the defendants to raise their sunken barge.

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The material facts, as taken from the judgment, were as follows:—

On August 1, 1897, the barge *Snark*, in consequence of a collision with a steamer, and without negligence on the part of the defendants or their servants, was sunk in the fairway off Cuckold's Point in Limehouse Reach of the river Thames.

On hearing of the accident the defendants' foreman saw one Forrest, an under-waterman and diving contractor, and a proper person to employ, as he had frequently conducted salvage operations of this nature. A verbal arrangement was come to by the foreman with Forrest that he should raise the barge for 20*l.* if it proved an easy job, and 25*l.* if it proved troublesome; and the defendants undertook to provide a barge for Forrest to work with. Nothing was said about lighting the wreck.

Forrest told the officials of the Thames Conservancy of the sinking of the barge, and for a short time a boat belonging to the Thames Conservancy, with a flag on it, was made fast to the *Snark*. For this service the defendants paid the Thames Conservancy, but the defendants having supplied Forrest with the barge *Rhoda*, he and his men went down to the place where the *Snark* was sunk, and took charge of her. The Conservancy boat was then taken away. The *Rhoda* was made fast, but the evidence as to how the fastening was effected was not clear. According to Forrest and his men, they had an anchor in the wound made by the steamer which sank the *Snark*, and two other anchors out.

In the early morning of August 3 the German steamship *Vesta*, owned by the plaintiff, and in charge of a licensed Trinity House pilot, with a general cargo and passengers, from Hamburg to St. Katherine's Docks, London, ran upon the submerged barge and was seriously damaged.

At the time the *Vesta* ran upon the wreck, Forrest was ashore, only one man then being on board the *Rhoda*, though two others were in a small boat in which they had been ashore, and they said that on the way back they were looking after some buoys attached to the anchors. After

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the accident Forrest raised the *Snark* and was paid 25*l.* by the defendants.

On December 5 and 6, 1898, the case was tried before Gorell Barnes J., assisted by two of the Elder Brethren of the Trinity House, when the plaintiff, the owner of the *Vesta*, alleged that the accident happened owing to the negligence of those in charge of the salvage operations in not properly placing lights so as to warn persons navigating the river of the danger occasioned by the sunken barge, whilst the defendants alleged that it arose from the improper navigation of the plaintiff's steamship. The learned judge found that the barge *Rhoda* had been placed by Forrest and his men, with lights upon it, with the object of warning persons in charge of other vessels of the spot where the wreck lay, but that the barge had been negligently and improperly placed in, or allowed before and at the time of the accident to swing into, a position at some distance across the stream, so that it did not properly guard the wreck; and, in consequence, the plaintiff's vessel, while passing at a safe and proper distance from the warning lights, ran directly on to the sunken barge.

The question of law as to the personal liability of the defendants was reserved.

1898. Dec. 13. *Carver, Q.C.*, and *Stubbs*, for the plaintiff, the owner of the *Vesta*. On the finding of fact, as to the negligence of the contractor employed by the defendants, the plaintiff is entitled to judgment against them personally, for, after the sinking of the barge, not having either abandoned or legitimately transferred the control, her owners remained under "an obligation in regard to the protection of other vessels from receiving injury from her." See the result of the authorities summed up by Sir Francis Jeune in delivering the judgment of the Privy Council in *The Utopia*. (1)

The defendants could not divest themselves of this obligation by the employment of Forrest, for they were bound to see that Forrest did for them what they were themselves bound to do—that is, mark the position of the wreck. The law on this

(1) [1893] A. C. 492, at p. 498.

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subject, which is the same whether on land or in a navigable river, has been laid down by the Court of Appeal in *Hardaker* v. *Idle District Council.* (1)

[They were stopped by the Court.]

*Pyke*, *Q.C.*, and *Lauriston Batten*, for the defendants. The *Snark* was sunk without negligence on the part of the defendants, and, if any duty then rested on them, it was discharged by their abandoning the possession and control to an independent contractor whom they selected to conduct the salvage operations, and for the negligence of the servants of Forrest the defendants cannot be held liable, as he was a person exercising a separate employment: *Milligan* v. *Wedge.* (2) There is no distinction in principle in the duty of the owners of a vessel whether she is afloat or sunk. In either case they can transfer the possession and control to another person, and thereby relieve themselves from liability. In *Brown* v. *Mallett* (3) the obligation to protect other vessels against injury was held not to lie on the defendants, in the absence of an allegation that the possession and control of the vessel, after she had foundered, was in them, and it is clear from *White* v. *Crisp* (4) that, where the owners have properly parted with the control and management of the vessel, their liability ceases. If, as in the present case, the wrong complained of arises from negligence in the way the contractor does the work, and not in any danger arising from the doing of the work, the employer is not liable: *Gray* v. *Pullen.* (5)

In actions in rem, the negligence of the owners or their servants, at the time of the commission of the wrongful act alleged to give rise to a lien, must be proved, and if, at that time, the management and control of the vessel was not in the hands of the servants of the owners, the foundation of the lien ceases to exist. With regards to vessels afloat this is shewn by the cases of *The Tasmania* (6), *The Quickstep* (7), and *The Castlegate.* (8) With regard to a sunken vessel this was

(1) [1896] 1 Q. B. 335.
(2) (1840) 12 A. & E. 737.
(3) (1848) 5 C. B. 599.
(4) (1854) 10 Ex. 312.
(5) (1864) 5 B. & S. 970.
(6) (1888) 13 P. D. 110.
(7) (1890) 15 P. D. 196.
(8) [1893] A. C. 38.

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expressly so held in *The Utopia* (1), and the facts of that case further support the view that the present defendants are not liable, for, in that case, the owners intended to raise the vessel, and eventually did so, but, at the material time, they had transferred the control and management of the wreck to the port authority, and they were held excused, though it is at least doubtful whether the port authority legally had power to deal with the protection of sunken vessels. In *Hardaker* v. *Idle District Council* (2) Lindley L.J. bases his judgment on a duty imposed on the district council on account of the danger which would result from breaking the gas-pipes whilst removing the soil from under them in the construction of the sewer (3), and A. L. Smith L.J. also relies upon the risk necessarily attending the operation as casting a duty upon the district council (4); but the circumstance that the work was in its nature hazardous is not present in this case, as the salvage operations, if performed by the contractor Forrest with reasonable care, did not involve any particular risk. The judgment of Rigby L.J. (5) rests upon the fact that the stringent terms of the contract made the relationship of the district council and the contractor practically that of master and servant; but in this case it is clear that Forrest was left free, as an independent contractor of admitted competency, to carry out the salvage operations in the way he thought best.

*Carver, Q.C.*, in reply. The sunken vessel was a nuisance unless marked. The duty to mark it could not be got rid of by delegating that duty to a contractor, for the defendants were bound to see that the duty was performed. The defendants contend that they could abandon control to Forrest, but, as a matter of fact, they did not abandon the vessel so as to bring themselves within *Rex* v. *Watts*. (6) The defendants never released the control; they employed Forrest to raise the barge for them, and they could not temporarily transfer the possession to Forrest so as to rid themselves of liability. A transfer could only have been effectually made to the harbour

(1) [1893] A. C. 492, at p. 499.
(2) [1896] 1 Q. B. 335.
(3) [1896] 1 Q. B. 335, at p. 342.
(4) [1896] 1 Q. B. 335, at p. 346.
(5) [1896] 1 Q. B. 335, at p. 352.
(6) (1798) 2 Esp. 675.

authority, or result from the sale of the sunken barge to a bonâ fide purchaser.

[Reference was made to Beven on Negligence, 2nd ed. p. 493, et seq.; *The Douglas* (1); *Gilbert* v. *Corporation of Trinity House* (2); *Penny* v. *Wimbledon Urban District Council* (3); *Blake* v. *Woolf*. (4)]

*Cur. adv. vult.*

1899. Jan. 26. GORELL BARNES J. [After stating the facts already set out, the learned judge continued:—] This case has been ably argued by counsel, and, shortly put, the plaintiff's point is that the maxim "Respondeat superior" applies, whereas the defendants say that they were not liable for the default of an independent contractor.

The exact case does not appear to have been decided, though the principles to be applied in these cases of negligence committed by persons employed by, but not servants of, the employer, have been much discussed: see the very large number of cases cited by Mr. Beven in his work on Negligence. One of the latest cases dealing with this point is that of *Hardaker* v. *Idle District Council* (5), where the present Master of the Rolls and A. L. Smith and Rigby L.JJ. gave elaborate judgments on the subject.

After considering the matter upon principle, and with the assistance of the decided cases, I am of opinion that the defendants are personally liable in this action.

The result of the cases of *Brown* v. *Mallett* (6), *White* v. *Crisp* (7), and *The Douglas* (1) was stated in the judgment of the Privy Council, delivered by Sir Francis Jeune in *The Utopia* (8), as follows: "The owner of a ship sunk whether by his default or not (wilful misconduct probably giving rise to different considerations) has not, if he abandon the possession and control of her, any responsibility either to remove her or to protect other vessels from coming into collision with her.

(1) (1882) 7 P. D. 151.
(2) (1886) 17 Q. B. D. 795.
(3) [1898] 2 Q. B. 212.
(4) [1898] 2 Q. B. 426.
(5) [1896] 1 Q. B. 335.
(6) 5 C. B. 599.
(7) 10 Ex. 312.
(8) [1893] A. C. 492, at p. 498.

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It is equally true that so long as, and so far as, possession, management, and control of the wreck be not abandoned or properly transferred, there remains on the owners an obligation in regard to the protection of other vessels from receiving injury from her. But in order to fix the owners of a wreck with liability two things must be shewn, first, that in regard to the particular matters in respect of which default is alleged, the control of the vessel is in them, that is to say, has not been abandoned, or legitimately transferred, and, secondly, that they have in the discharge of their legal duty been guilty of wilful misconduct or neglect."

This statement of the law was relied on by both sides on the argument before me; but each took a different view as to the meaning of the terms "abandonment" or "proper transfer of the possession, management, and control of the vessel. This has to be considered.

If a vessel has been sunk in a public navigable river and becomes a dangerous obstruction to navigation, the wreck is a public nuisance. The owner in whose possession she was at the time of the sinking, and whether the sinking has occurred by his default or not (wilful misconduct, as stated in the above passage, probably giving rise to different considerations), may, however, abandon the wreck. He is not bound to remove it. As is pointed out in *Rex* v. *Watts* (1) and *Brown* v. *Mallett* (2), to compel him to do so might involve him in an outlay wholly disproportionate to the benefit of the salved property to him. If he abandon, his liability ceases, subject to a question which I need not enter upon, as to whether or not he has a duty to give some public notice of the wreck.

If he does not abandon the vessel, he either retains possession and control (by which I understand that he has and retains power by due care and exertion to remove the wreck altogether, or to shift its position, so as to prevent it being a source of danger), or he is temporarily forced entirely away from the wreck. So long as he retains possession and exercises the dominion and control of an owner of the wreck he is under an obligation to use reasonable care to warn other vessels of

(1) 2 Esp. 675. (2) 5 C. B. 599, at p. 619.

her position, and to remove the obstruction with reasonable diligence. If the owner be temporarily forced away from the vessel, but does not abandon, and intends, and has power, to salve the property, it would seem that his duty is the same, though the circumstances will affect the manner of its discharge. *The Douglas* (1) appears to have been a case of this kind, and to have been decided on the ground that, in the circumstances, the crew were unable to do more than give notice to the harbour authorities, who had the powers conferred by the Removal of Wrecks Act, 1877, and obtain their undertaking to light the wreck. See especially the judgment of Lord Coleridge. (2) If actual possession and control be resumed, the owner's obligation is, of course, the same as when he retains possession and control.

If the owner transfer the wreck to some other person, who takes from him the possession and control thereof, that person takes over the duties and liabilities of the owner: *White* v. *Crisp*. (3) The owner's position is correctly stated in Addison on Torts, 7th ed. p. 622, and in Garrett on the Law of Nuisances, 2nd ed. p. 93.

If, however, the owner, having the possession and control, in the sense above stated, merely employ another person to raise and remove the wreck for him, there is no transfer of the wreck; and although the person employed may be placed in actual physical custody of the wreck, the owner does not, in my opinion, discharge himself from the duty towards the public which rested upon him of using reasonable care to warn other vessels of the position of the wreck which remains his property. Even if the other person be expressly employed on the terms that he shall light the wreck properly during the salvage operations, he is employed by the owner to discharge for the owner a duty which rested upon the latter. The owner does not get rid of his liability by employing some one to perform it for him. The case is not precisely the same, but presents analogy to the cases of which *Hardaker* v. *Idle District Council* (4) is one. The owner has a duty to perform—namely,

(1) 7 P. D. 151.
(2) 7 P. D. at p. 158.
(3) 10 Ex. 312.
(4) [1896] 1 Q. B. 335.

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to use reasonable care to warn other vessels of the position of the wreck, and cannot in my judgment escape from the responsibility attaching to him of seeing that duty performed by delegating it to a contractor.

The case of *The Utopia* (1), rightly understood, appears to me to support these views, and not to detract from them. There a vessel was wrecked in Gibraltar Bay, and the port authorities took from the owners and assumed the task of protecting other vessels from the wreck, and neglected that duty. It was held that the owners of a vessel colliding with the wreck could not proceed against the wreck for their damages. The ground of the decision, as I pointed out in *The Ripon City* (2), was that the authorities had taken action within the apparent scope of their powers as port authority, and that the owners could not, therefore, be made liable nor the wreck proceeded against for their default. It was in fact a case of vis major, and not a case where another person was voluntarily employed by the owners to perform their duty for them. The greater part of the reasoning of the judgment would have been unnecessary if the Judicial Committee had thought that the owners could get rid of their liability by delegating their duty to an independent person.

The argument forcibly addressed to me by counsel for the defendants, that there is no difference between the case of an owner of a wreck sunk in and obstructing a navigable river and that of an owner who employs a contractor to navigate her in ordinary circumstances from one place to another, as regards his duty to the public, appears to me to be fallacious. In the one case the wreck is a dangerous nuisance, and the owner's rights and liabilities are such as I have already stated. In the other case there is only an employment by the owner of a contractor to do work about which there is no danger if properly performed, and not an employment to discharge a duty which rests upon the owner: see the judgment in *Hardaker* v. *Idle District Council*. (3)

In the present case the defendants' men were temporarily

(1) [1893] A. C. 492. (2) [1897] P. 226, at p. 239.
(3) [1896] 1 Q. B. 335.

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Gorell Barnes J.

driven off the *Snark* by her sinking, but the defendants afterwards employed Forrest to raise the wreck, and placed him in possession and control thereof for that purpose. Forrest neglected to discharge the defendants' duty to use reasonable care to warn other vessels, one of which was the plaintiff's, of the position of the wreck, and for this negligence the defendants are, in my opinion, liable. Moreover, it is to be noticed that the defendants did not instruct Forrest to light the wreck—nothing whatever was expressly arranged about this at any time; it was merely left to him to do what he considered necessary to raise and remove the wreck.

In conclusion I desire to note that, as this is a personal action, I have not entered upon any question as to the rights of the plaintiff against the res.

My judgment is for the plaintiff against the defendants for an amount of damages to be assessed by the registrar and merchants, and costs.

Solicitors for plaintiff: *Stokes & Stokes.*

Solicitors for defendants: *J. A. & H. E. Farnfield.*

T. L. M.

1898
*Nov.* 25.

[IN THE CONSISTORY COURT OF LONDON.]

## DRUCE *v.* YOUNG AND OTHERS.

*Ecclesiastical Law—Jurisdiction—Faculty—Acceptance of Letters of Request granted in Aid of Probate Action—The Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 29—*The Supreme Court of Judicature Act Amendment Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 18—*Discretion*—6 & 7 *Will.* 4, *c. cxxxvi.*, *s.* 4—*The Burials Act*, 1857 (20 & 21 *Vict. c.* 81), *s.* 25—*Jurisdiction to Decree Faculty for Opening a Vault and Coffin in Consecrated Burial Ground for the Purpose of Identification and to Remove Remains there Buried—Licence of Secretary of State before Opening Vault not required.*

The Chancellor of the Diocese of London, in the exercise of his judicial discretion, may accept letters of request, signed by the President of the Probate, Divorce, and Admiralty Division, requesting that in aid of the trial of an issue in a probate action a faculty may be granted authorizing the opening of a vault in a consecrated burial ground in the diocese, and the opening and inspection of a coffin there buried, for the purpose of identification, and issue a faculty to give effect to such letters of request.

During the hearing of an opposed cause of faculty instituted for the purpose of obtaining a faculty for the opening of a vault in the consecrated portion of the North London Cemetery at Highgate, and the opening and inspection of a coffin there buried, the Chancellor, with the consent of all parties, adjourned the case to enable the petitioners to apply to the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice to issue letters of request to the Chancellor to grant a faculty for the above-mentioned purposes in aid of justice, and of an issue in a pending probate action in which one of the petitioners was plaintiff. On the application before the President it appeared that the probate action had been brought for the revocation of the probate of the will and codicil of a testator—a relative of the petitioners—alleged to have been buried in the coffin required to be opened, and, on primâ facie evidence having been given that the testator had been seen alive after the date of the grant of the probate sought to be revoked, the President ordered letters of request to issue. Some evidence to the same effect had also been given in the faculty suit previously to the issue of the letters of request, and it had been proved there that one of the petitioners was registered in the books of the cemetery—a cemetery established under a private Act of Parliament—as the owner of the vault proposed to be opened. The grant of the faculty was opposed by the surviving executor of the testator and by other parties interested under the will, and on their behalf evidence was tendered to the Chancellor to shew that the testator had died before the date of the probate, and had been buried in the coffin proposed to be opened:—

*Held*, that the Court, in the exercise of its discretion, would accept the

letters of request, reject the evidence tendered on behalf of the opponents, and decree a faculty to issue according to the tenor of the letters of request:

*Held*, also, that s. 25 of the Burials Act, 1857, which provides that "except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary it shall not be lawful to remove any body or the remains of any body which may have been interred in any place of burial without licence under the hand of one of Her Majesty's principal Secretaries of State . . . ." did not require that a proviso should be inserted in the faculty that the faculty was granted subject to the licence of one of Her Majesty's principal Secretaries of State.

*Semble*, that the faculty might be lawfully acted upon without any such licence having been obtained.

THIS was a cause of faculty carried on on behalf of Sidney George Druce, the only son and heir of Walter Thomas Druce, son of Thomas Charles Druce, of Holcombe House, Mill Hill, in the county of Middlesex, and the Baker Street Bazaar, Nos. 58 to 68, Baker Street, in the county of London, and Anna Maria Druce of 26, Torrington Square, in the county of London, widow and administratrix of the said W. T. Druce, for the purpose of obtaining a faculty for the opening and inspection of vault No. 13,610 in the consecrated portion of the North London Cemetery at Highgate, and a coffin therein contained, as prayed in an amended petition filed in this suit, and requested by letters of request signed by the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice (The Right Honourable Sir Francis Jeune), together with such order to move other coffins in the vault, and other directions as hereinafter mentioned. (1)

(1) The proceedings in this case commenced by an ex parte application for a similar faculty being made by petition on behalf of Mrs. Druce, and in accordance with the practice of the Court in such cases no citation was issued or served before the hearing, but, the case coming on ex parte for hearing before the Court on March 9 last, the Court, after hearing evidence on behalf of Mrs. Druce, in the absence of opposition, decreed a faculty to issue as prayed after the expiration of fifteen days from the date of the decree. Subsequently, and before the expiration of these fifteen days, an application was made to the Court on behalf of Alexander Young, the sole surviving executor of Thomas Charles Druce, and the following relatives of Thomas Charles Druce and Annie Druce, namely, Herbert Druce, Hannah Druce, Florence Maria Druce, and Bertha Marion Grant, formerly Bertha

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The above-mentioned amended petition contained (inter alia) averments to the following effect: That the above-mentioned W. T. Druce was the only lawful son of T. C. Druce, of Holcombe House, Mill Hill, aforesaid, who married, in October, 1851, one Annie May, spinster, who gave birth to the said W. T. Druce on February 5, 1852. That the said T. C. Druce was alive in 1877, but how long thereafter the petitioners could not say, and the Court had jurisdiction to presume that, at the date of the petition, not having been heard of for many years, he was then dead, leaving the petitioner S. G. Druce his heir-at-law. That at some time in the year 1864 T. C. Druce disappeared from Mill Hill, Hendon, where he was living, and on or about December 31, 1864, a ceremony of burial look place of a coffin purporting to contain the human remains of the said T. C. Druce, he being alleged to have died on December 28, 1864, such burial being in fact the burial of a coffin. That the said coffin was deposited in a brick vault, No. 13,610, in consecrated ground of the North London Cemetery in Swain's Lane, Highgate, and that on October 4, 1897, a transfer was made in the register of vaults and graves in the Highgate Cemetery, whereby the said vault, originally granted by the Highgate Cemetery Company to Annie Druce, the widow of T. C. Druce, and afterwards transferred to Herbert May, known as Herbert

Marion Druce, for leave to enter appearances as interveners to the above petition, and file an answer denying the averments therein, and on March 15 last such leave was granted by the Court. Before, however, any appearances in pursuance of this leave had been entered, the said Alexander Young and the other persons who had applied to enter appearances as interveners obtained from a Divisional Court of the Queen's Bench Division a rule nisi for a prohibition prohibiting any further proceedings in the matter of the petition. Cause was shewn against this rule on May 12 and 13 last, and the rule was discharged. See *Reg.* v. *Dr. Tristram*, [1898] 2 Q. B. 371, where the proceedings are reported. Afterwards the said Alexander Young and the other persons who had obtained leave to intervene appeared as interveners, and the petitioner by consent of the Court added the above-mentioned S. G. Druce as a petitioner, and filed an amended petition in the suit, being the amended petition referred to in the text.

[The practice of the Court where, after an ex parte order decreeing the issue of a faculty, an intervention takes place in opposition to the faculty before it has actually issued is stated in *Reg.* v. *Dr. Tristram*, [1898] 2 Q. B. 371, at pp. 372, 375.]

Druce, one of certain offspring born to the said T. C. Druce and Annie May, before their marriage, was transferred to the petitioner S. G. Druce, and the title of the said S. G. Druce to the said vault was at the date of the petition recognised and admitted by the owners of the cemetery.

The amended petition then continued, so far as material to this report, as follows:—

"12. The following other interments have taken place respectively in the said vault, namely, James Druce, in 1871, the said W. T. Druce, in 1881, and Annie Druce, the widow of the said T. C. Druce, in April, 1893.

"13. Subsequently to the said alleged death of the said T. C. Druce, a certain alleged will of the said T. C. Druce, purporting to be dated March 28, 1860, and a codicil thereto purporting to be dated November 14, 1864, was proved in common form on or about February 10, 1865, by three of the executors therein named, namely, Alexander Young, Annie Druce, and John Smith.

"14. Your petitioner, A. M. Druce, as administratrix of the said personal estate of the said W. T. Druce, is about to commence proceedings in the Probate Division of the High Court of Justice for the revocation of the said will and codicil, on the ground that the said T. C. Druce did not die on December 28, 1864, or at any date approximate thereto as alleged.

"15. Your petitioner, A. M. Druce, also proposes to take proceedings, as administratrix of W. T. Druce, for an account of the estate and moneys of the said T. C. Druce, which have been distributed by the said alleged executors, and which ought to have been paid over to the said W. T. Druce in his lifetime.

"16. Your petitioner, A. M. Druce, desires, for the purposes of the said civil proceedings, to obtain the best evidence in support of her said contention, which can only be obtained by the opening of the said coffin, and makes this application for the purpose of such discovery.

"17. It is submitted that s. 25 of the Burials Act, 1857, has in nowise affected the jurisdiction of this Court, and that the licence of the Secretary of State is not a condition precedent to

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an order of this Court for the opening of a vault in consecrated ground; but your petitioner, A. M. Druce, thinks it right to inform this Court that she, on or about December 31, 1897, made an application to the Secretary of State for the Home Department for an order to open the said vault, to which said application the said Secretary of State replied that he was unable to entertain it, no legal proceedings being then pending which would justify such a course.

"18. Your petitioners submit that, notwithstanding the powers conferred upon the Secretary of State under the said section, this Court has jurisdiction to order the opening of the said vault in the said consecrated ground as aforesaid; that neither the order of the said Secretary of State nor the commencement of any legal proceedings, other than the proceeding for a faculty, is a condition precedent of the right of this Court to entertain this petition."

The amended petition concluded with a prayer that the Court "would be pleased to decree a licence or faculty to issue to the petitioners giving them or either of them leave or licence, subject as hereinafter mentioned, to open the vault, No. 13,610, in the consecrated portion of the North London Cemetery, situate in Swain's Lane, Highgate, and to open the lid of the coffin interred in the said vault purporting to contain the human remains of T. C. Druce, and to inspect the contents thereof in order to ascertain whether the said last-mentioned coffin actually contained the human remains of the said T. C. Druce, or any human remains, or to examine the remains of the said coffin if broken up, and the soil underneath the same, to ascertain whether there are human remains in the soil underneath the remains of the said coffin; provided always that the remains, if any, in the said coffin shall not be removed or disturbed in the said coffin, or the said coffin removed, and that the said coffin, after the inspection, be resealed, and left in as good plight and condition as it was before the opening thereof, and that in the said coffin such disinfectants shall be used as shall be prescribed by the medical officer of the district to render the opening sanitarily safe," and for an order "giving leave and licence to the petitioners, or either of them, to place

on one side or remove in the said vault as far as necessary for that purpose other coffins in the said vault, subject to their being after the said inspection replaced in their present position. And that the inspection of the said coffin of T. C. Druce be conducted in the presence of creditable witnesses appointed by the Court, or for such other orders and directions in the premises as this Court may deem meet and proper, and as are within its jurisdiction."

Appearances as interveners to the petition having been entered for Alexander Young, as the sole surviving executor of T. C. Druce, and for the following relatives of T. C. Druce, namely, Herbert Druce, Hannah Druce (1), Florence Maria Smith, formerly Florence Maria Druce, and Bertha Marion Grant, formerly Bertha Marion Druce, an answer was brought in on their behalf on June 17, last. (2) Such answer, after denying the averments in the amended petition that W. T. Druce was the only lawful son of T. C. Druce, that T. C. Druce was alive in 1877, or at any time subsequent to December 28, 1864, and that the title of vault, No. 13,610, was in the petitioner, S. G. Druce, and alleging that T. C. Druce died on December 28, 1864, and was buried on December, 31, 1864, in the said vault within the jurisdiction of the Court, that the title of the said vault was in the six children of T. C. Druce equally, of which the interveners H. Druce, F. M. Smith, Hannah Druce, and B. M. Grant were four, and that, no proceedings for the revocation of the probate of the will of T. C. Druce having been commenced, the prayer of the petition was in the nature of a fishing inquiry, pleaded in the 15th paragraph thereof and subsequent thereto in terms as follows :—

"15. As regards the 17th and 18th paragraphs of the petition, the interveners say that they do not contend that the licence or permission of the Secretary of State under s. 25 of the Burials Act, 1857, is a condition precedent to the granting of the faculty or licence prayed in the said petition ; but they do contend that, if the faculty be granted under the said section of the

(1) The widow of one Sidney George Druce, who died May 6, 1883.

(2) See supra, p. 85, note.

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said Act, any person acting under such a faculty, unless he or she first obtain the licence or permission of the Secretary or State for that purpose, will be guilty of an offence punishable by law.

"And by way of further answer to the said petition generally, . . . . the interveners say that there are living witnesses who can of their own knowledge testify that the said Thomas Charles Druce did die on December 28, 1864, that his dead body was laid in a shell which was placed in a coffin of lead which was inclosed within a coffin of oak, and that his dead body contained in such shell and coffins was laid in the said vault in Highgate Cemetery on December 31, 1864; and they submit that there cannot be evidence produced to the contrary to justify the prayer of the said petition."

The petitioners in their responsive allegation, filed June 25, last, and subsequently amended (1), alleged that the order of the Secretary of State was not made a condition precedent or subsequent of the execution of the faculty prayed for; that the petitioner had commenced a probate action in the Probate Division of the High Court of Justice against the intervener, Alexander Young, for the purpose of obtaining the revocation of the probate of the will of T. C. Druce; that in such action the defendant had alleged, and the plaintiff had denied, that T. C. Druce died on December 28, 1864, upon which issue had been joined; and that the Court ought to accede to the prayer of the petition for the purpose of furthering the ends of justice.

1898. July 28, 29. On these days the suit was heard before the Chancellor of the Diocese of London (Dr. Tristram, Q.C.), when four witnesses, the result of whose evidence is stated in the judgment, and one of whom put in evidence the pleadings of the above-mentioned probate action, were called, and gave evidence on behalf of the petitioners.

*Arnold Statham* and *Campbell Johnston*, for the petitioners. The Court has full jurisdiction to grant the faculty prayed. The Burials Act, 1857, has no application to the Highgate

(1) At the hearing of the suit, issue having at that time been joined in the probate action.

Cemetery, that cemetery having been established and being now governed under the special provisions of a private Act of Parliament (1); but even if the petitioners are wrong in this, it is now clear that the licence of the Home Secretary, under the 25th section of the Act of 1857 (2), is not a condition precedent to that jurisdiction being exercised: *Reg.* v. *Dr. Tristram.* (3) The petitioners also contend that the licence of the Home Secretary is not required at all in the present case, and that the Court is not bound, and ought not, to insert in the faculty a proviso that the faculty is not to be acted on without such licence. What is asked for to be allowed to be done is either within the exception in the section whereby the jurisdiction of the Ordinary to authorize the removal of a body from one consecrated "place of burial" (4) to another is

(1) The 6 & 7 Will. 4, c. cxxxvi. This Act, which was afterwards amended by 6 Vict. c. xxxvi., is entitled, "An Act for establishing Cemeteries for interment of the dead, northward, southward, and eastward of the Metropolis, by a company to be called the London Cemetery Company," and provides, by s. 2, that the company should make and maintain three cemeteries, one of which was to be in the parish of St. Pancras and the parish or parishes adjoining thereto, or some or one of them.

Sect. 4 of the Act is as follows: "And be it further enacted that part of the said intended cemeteries or burial grounds respectively shall be set apart for the interment of the dead according to the rites and usages of the United Church of England and Ireland, and may be consecrated for that purpose by the bishop for the time being of the diocese in which the same may be locally situate, and when so consecrated the same shall for ever thereafter be set apart and be used and applied exclusively for the purpose of Christian burial."

(2) The 25th section of the Burial Act, 1857 (20 & 21 Vict. c. 81), is in the following terms: "Except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary for that purpose, it shall not be lawful to remove any body or the remains of any body which may have been interred in any place of burial without licence under the hand of one of Her Majesty's principal Secretaries of State, and with such precautions as such Secretary of State may prescribe as the condition of such licence; and any person who shall remove any such body or remains contrary to this enactment, or who shall neglect to observe the precautions prescribed as the condition of the licence for removal, shall on summary conviction before any two justices of the peace forfeit and pay for every such offence a sum not exceeding ten pounds."

(3) [1898] 2 Q. B. 371.

(4) As to the meaning of the term "place of burial" in the 6 & 7 Will. 4, c. cxxxvi., see ss. 10 and 11 of that Act, where the term is used as ejusdem generis with "vaults, catacombs, arches, brick graves," and "graves."

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preserved, or is not struck at by the enacting part of the section, by reason that the removal there spoken of is the removal of a body from one place of burial to another place of burial, which can, in the case of consecrated ground, be authorized by faculty, and not the alteration of the position of a body in a vault or burial-place, or the moving of a body intended to be replaced in the same burial-place. In other words, in the case of consecrated burial-places, the enacting part of the section is no wider than the exempting part, and the licence of the Home Secretary is only required by the section where the removal is from or to a place of burial in unconsecrated ground: *Reg.* v. *Feist* (1); *Reg.* v. *Sharpe* (2); when apart from the provisions of the section, the Court would have no jurisdiction: *In re Dixon.* (3) Moreover, the inherent jurisdiction of the Court to authorize for good cause the alteration of the position of bodies or remains buried in consecrated ground is undoubted: *In re Sarah Pope* (4), and the authorities cited in *Reg.* v. *Dr. Tristram* (5); *The Vicar of St. Botolph Without Aldgate, &c.* v. *The Parishioners of the Same.* (6) And the Legislature has not, in the 25th section of the Act of 1857, used such words as have had the effect of so curtailing the jurisdiction of this Court that it can only be exercised subject to the will of the Home Secretary. The taking away or diminution of an established jurisdiction must be by clear and unambiguous words: Maxwell On the Interpretation of Statutes, ed. 3, p. 183; *The Rector, &c., of St. Michael Bassishaw* v. *The Parishioners of the Same* (7); *Lee* v. *Hawtrey.* (8) It may also be that the object of the petitioners can be obtained without moving any coffins—in which case, of course, the section, however construed, would not be infringed.

Assuming the Court does possess the jurisdiction, it ought to exercise it in the present case. Not only have the petitioners produced primâ facie evidence to shew that the allegations in the answer as to the death and burial of T. C. Druce in 1864

(1) (1858) Dears. & B. C. C. 590.
(2) (1857) Dears. & B. C. C. 160.
(3) [1892] P. 386.
(4) (1851) 15 Jur. 614.
(5) [1898] 2 Q. B. 371.
(6) [1892] P. 161, 171.
(7) [1893] P. 233, at p. 242.
(8) [1898] P. 63.

are false, but the grant of the faculty is required in aid of justice, and for the purpose of the discovery of evidence which will be most material on the issue raised in the pending probate action. It is the duty of this Court to grant the faculty as ancillary to the jurisdiction of the Probate Division of the High Court on the same principles and for similar reasons as those which governed the Court of Chancery when it gave relief by way of discovery in aid of the Ecclesiastical Court: *Morgan* v. *Harris* (1), or an application was made to it for discovery in aid of an action of ejectment in the Common Law Courts; and just as in these and analogous cases the petitioners, having given formal evidence in support of their claim, this Court will not compel them to go further, and try here the issue raised in the probate action.

[They referred to *Dell* v. *Hale* (2); *Ind, Coope & Co.* v. *Emmerson* (3); *Ball* v. *Montgomery* (4); *Finch* v. *Finch* (5); *Attorney-General* v. *Gaskill* (6); *Hall* v. *The London and North Western Ry. Co.* (7); *China Steamship Co.* v. *Commercial Assurance Co.* (8); *Hodsoll* v. *Taylor* (9); *Downing* v. *Falmouth United Sewerage Board* (10); *Eade* v. *Jacobs* (11); *Benbow* v. *Low* (12); *Marriott* v. *Chamberlain* (13); 2 Phillimore's Ecclesiastical Law, 981.]

*Bargrave Deane, Q.C.*, and *Phillimore*, for the interveners. The right of burial in the vault proposed to be opened is by the 12th section of 6 & 7 Will. 4, c. cxxxvi., made personal estate, and, therefore, the vault ought not to be opened without the consent of those of the interveners who are the children of T. C. Druce, and consider that such opening is quite uncalled for in the face of the evidence afforded by the certificates of the death and burial of T. C. Druce in 1864, and having regard to the further evidence which the interveners are prepared to give that he did die and was buried as there stated. The

(1) (1786) 2 Bro. C. C. 121.
(2) (1842) 2 Y. & C. C. C. 1.
(3) (1887) 12 App. Cas. 300.
(4) (1793) 2 Ves. Jun. 191.
(5) (1752) 2 Ves. 491, 494.
(6) (1882) 20 Ch. D. 519, 529.
(7) (1877) 35 L. T. 848.
(8) (1881) 8 Q. B. D. 142.
(9) (1873) L. R. 9 Q. B. 79.
(10) (1887) 37 Ch. D. 234, 242.
(11) (1877) 3 Ex. D. 335, 337.
(12) (1880) 16 Ch. D. 93.
(13) (1886) 17 Q. B. D. 154.

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interveners admit that this Court has power to grant the faculty, and they do not consider it necessary to argue here that if granted it cannot legally be acted on without the licence of the Home Secretary; but this cause of faculty, like any other opposed suit, must be heard on the merits, and when this has been done and both sides heard it will be apparent that the opening and inspection of the coffin of T. C. Druce would not be material evidence in support of the case of the petitioners. When the ex parte decree for the faculty was made the interveners feared that the faculty would issue before they could be heard.

[DR. TRISTRAM. In accordance with the ancient practice of this Court, I never allow a faculty to go out of the registry under fifteen days from the date of the decree. A party interested has a right to appeal in that time. If your parties had come in and I had refused to allow them to intervene, you would have had a right to appeal. That is the reason of the rule.]

No sufficient reason has been shewn why the coffin should be opened. It is not as if the judge of the High Court who will try the probate suit had expressed an opinion that it would be an assistance in deciding the case that the faculty should be granted. Indeed, if even at the present stage of that suit an intimation were made by the President of the Probate Division that he was satisfied that the faculty ought to issue, those of the interveners who are most interested would probably not oppose.

On the second day of the hearing, after the consent of the petitioner, S. G. Druce, to the opening of the vault and the certificates of the death of T. C. Druce on December 28, 1864, and of his burial in the vault on December 31, 1864, had been put in, but before any oral evidence had been adduced on behalf of the interveners, the Court, with the concurrence of counsel for the petitioners and interveners, ordered that the application for the faculty prayed for should stand over in order that the petitioner, A. M. Druce, might apply to the President of the Probate, Divorce, and Admiralty Division of the High Court of

Justice to issue letters of request to the judge of this Court to grant in aid of law and justice in the above-mentioned probate action a faculty authorizing the opening of the said vault, and the opening and inspecting the said coffin purporting to contain the human remains of the said T. C. Druce; both parties having consented that at the same time an application should be made to the President for discovery generally in the said action.

1898. Nov. 12. The hearing of the suit was resumed, and

*Arnold Statham* and *Campbell Johnston*, on behalf of the petitioners, applied that the issue of the faculty as prayed should be decreed according to the tenor of letters of request to be presented to this Court from the President of the Probate Division.

They stated that on August 8 last the President of the Probate Division had ordered "that it be requested and intimated from that Court to Dr. Tristram, Q.C., D.C.L., Chancellor of the Diocese of London, to entertain at the Consistory Court," or as the parties might agree, "a petition pending before him for an order by way of further discovery for inspection of the coffin of the alleged deceased T. C. Druce, and alleged to be contained in a vault, No. 13,610, in the consecrated ground of the Highgate Cemetery; and also that some independent person, to be appointed by the President or by consent of parties, be present at the inspection and do report to the Court"; that an appeal against this order to the Court of Appeal had been dismissed, and that in pursuance of the order letters of request would as soon as possible be drawn up, signed, and presented to this Court.

[They cited *Burgess* v. *Morton*. (1)]

*Bargrave Deane, Q.C.*, and *Phillimore*, on behalf of the interveners, opposed the grant of the faculty, and applied for leave to examine witnesses in opposition to the granting of the same. The order of Court made by the President in chambers intimates that this Court ought "to entertain the petition," and, therefore,

(1) [1896] A. C. 136.

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it is for this Court under the terms of the order not merely to hear the evidence of the petitioners in favour of granting the faculty, but also whatever evidence in opposition the interveners may wish to adduce.

*Cur. adv. vult.*

On November 24, 1898, the letters of request from the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice having been signed by him and transmitted to the registry of this Court, were accepted by the Chancellor of the Diocese of London. (1)

The letters of request, which were addressed to T. H. Tristram, D.C.L., Vicar-General and Official Principal of the Bishop of London, after recitals of the pendency of the present suit in this Court and of the action in the Probate Division, and the hearing of the present suit on July 29, 1898, and the order then made as above mentioned, proceeded in the following terms:—

"And whereas we, in furtherance of your said order heard in chambers, on application made by counsel on behalf of the plaintiff on the 3rd and 8th days of August, 1898, that we should make request to you to grant a faculty authorizing by way of discovery the inspection of the said coffin of the alleged deceased Thomas Charles Druce, and after reading an affidavit of Margaret Jane Louisa Hamilton, sworn on the 8th day of August, 1898, and having heard her cross-examined by counsel for the defendant, and having perused certain affidavits produced by the defendants from the Crown Office in opposition to the said application, and after hearing counsel for the plaintiff and defendant thereon, we, being satisfied upon the facts disclosed during the hearing of the said application that there is a substantial probate action pending in the said Court, and that the plaintiff has shewn that she has a substantial primâ facie case in support of the material issue in the said probate action, and that the evidence disclosed by the opening and inspection of the said coffin will be material evidence on such issue,

(1) The Letters of Request were also sealed with the Seal of Her Majesty's High Court of Justice Principal Registry Probate Division.

acceded to the said application of the plaintiff's counsel, and made an order dated the 8th day of August, 1898, in accordance therewith, against which said order the defendant prosecuted an appeal which was dismissed by the Court of Appeal on the 2nd day of November, 1898. Now therefore we hereby request you in aid of the administration of justice in the said probate action, as far as you can or may by your authority, in accordance with the practice of the said Consistory Court of London, to grant a faculty to the plaintiff authorizing by way of discovery the opening and inspection of the said coffin of the alleged deceased Thomas Charles Druce, interred in a vault in the consecrated portion of the North London Cemetery at Highgate, in the diocese of London, and within your jurisdiction."

1898. Nov. 25. The suit was called on, and, the registrar having by direction of the Court publicly read the letters of request, the following judgment was delivered:—

DR. TRISTRAM. In this suit questions of novelty and some of first impression have been raised. It originated in Mrs. Anna Maria Druce applying by petition and on an ex parte motion to this Court, on March 9 last, for a faculty to authorize the opening and inspection of a coffin interred on December 31, 1864, in a vault in the consecrated portion of the North London Cemetery, at Highgate, purporting to contain the body of her father-in-law, Mr. Thomas Charles Druce, the proprietor of the Baker Street Bazaar, who, by the certificate of his death, had died on the 28th of the same month. The application was rested on two grounds: first, that evidence had recently come to her knowledge that he had been seen alive some years after the funeral, which might be corroborated by the opening and inspection of the coffin; secondly, that if it was proved that his death and burial were fictitious, the probate granted in February, 1865, of his will disposing of 70,000*l.*, was invalid, and should be revoked, and that its revocation would entitle her, as the widow and administratrix of his eldest son, born after his marriage with Annie May, to have his estate accounted for and administered in Chancery, which would be

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for the pecuniary benefit of herself and the children of her marriage.

Upon hearing evidence, I decreed a faculty for the purpose asked, which, in accordance with the practice of the Court, would not issue until after the expiration of fifteen days from the date of the decree (the time allowed by ecclesiastical law for appealing from a decree), during which time any party having an interest adverse to the decree, and who had no notice of the application, is entitled to appear or oppose the issuing of the faculty. At the hearing of the motion I ascertained that Mr. Young, the surviving executor of the will, was living, and I ordered that the faculty should issue, subject to notice being given to him and to other members of the Druce family. On March 15 an application was made to me in chambers by the solicitor on behalf of Mr. Young and certain members of the Druce family for leave to enter appearances in opposition to the faculty, which application I granted, and a few days afterwards Mr. Bargrave Deane, as their counsel, obtained a rule nisi in the Queen's Bench Division against my proceeding to grant the faculty on the ground that, by the 25th section of the Burial Act, 1857, I was precluded from granting it without the licence of the Home Secretary. On May 12 and 13 Mr. Statham and Mr. Campbell Johnston, as counsel for Mrs. Druce, shewed cause against the rule nisi being made absolute in the Divisional Court before Wills and Kennedy JJ., who discharged the rule, holding (1.) that the jurisdiction of the Ecclesiastical Courts over all bodies buried in consecrated ground was not affected by s. 25 of the Burial Act, 1857; (2.) that no body buried in consecrated ground could be disturbed or removed without the sanction of a faculty; and (3.) that on general principle and on authority the ecclesiastical judges have jurisdiction to grant a faculty for the exhumation of a body buried in consecrated ground for the purpose of identification, and that a licence of a Secretary of State (if necessary at all by the above Act) was not a condition precedent to the granting of the faculty, and that, therefore, I would be acting within my jurisdiction in granting it. Whether it would be held that by the 25th section of the

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above Act a Secretary of State's licence was required, in addition to a faculty after it was granted, to warrant the opening of the coffin, their Lordships did not think it necessary for them to determine; but Kennedy J. added, that if I considered it was required, I might limit the terms of the faculty "by granting it subject to a licence being obtained from the Secretary of State": see *Reg.* v. *Dr. Tristram.* (1)

The application for a prohibition having failed, Mr. Young, and some members of the Druce family entered appearances through their solicitors in opposition to the issue of the faculty. The original petition was thereupon abandoned by Mrs. Druce's solicitors, and another one was filed on behalf of her and her son, Sidney George Druce, the registered proprietor in the books of the cemetery company of the vault in which the coffin was interred, in which petition Mrs. Druce alleged that she was about to commence at once proceedings in the Probate, Divorce, and Admiralty Division of the High Court of Justice for the purpose of obtaining revocation of the probate of Mr. Druce's will and codicil, on the ground that he did not die on December 28, 1864, or at any date approximate thereto, and for an account of his estate distributed in his lifetime, and was desirous of obtaining evidence in support of her contention by the opening and inspection of this coffin; and therefore she prayed the Court to authorize this to be done by a faculty.

The interveners in their answer denied that Mr. Druce died at any time subsequent to December 28, 1864, and alleged that the petitioner, not having commenced any proceedings for the revocation of the probate of his will and codicil, until she had done so, the inquiry she asked for was a fishing one, to which the Court ought not to render assistance. To this the petitioner Mrs. Druce, in her responsive allegation as amended, pleaded that she had commenced a probate action in the Probate, Divorce, and Admiralty Division of the High Court of Justice against the intervener, Mr. Young, for the purpose of obtaining the revocation of the said probate, and that in the pleadings in that action the said intervener had alleged, and she had denied, that Mr. Druce died on December 28, 1864,

(1) [1893] 2 Q. B. 371.

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upon which there had been a joinder of issue. The case was heard in this Court on July 26 and 29 last, when certain documentary evidence was put in by both parties consisting of certificates of the marriage, death, and burial of Mr. Druce, with certificates of the marriages, births, and deaths of other members of the Druce family; also evidence from the cemetery company that Mrs. Druce's son, Sidney George Druce, was registered in their books as the proprietor of the Druce vault, and of a consent in writing signed by him to the opening of the vault and coffin as asked for in the petition in compliance with the cemetery rules. The original probate of the will and codicil of Mr. Druce and certain of the executors' accounts were put in by the interveners, and a photograph of Mr. Druce, which he had given to one of his employees, was proved by the employee to be a striking likeness of Mr. Druce.

Upon this evidence Mr. Statham submitted that, as the material issue in this suit and in the probate action was one and the same, namely, whether Mr. Druce did or did not die on December 28, 1864, and as the evidence that would be procured by the opening of the coffin would be clearly material to this issue, the faculty might be granted. He further submitted that, his application being in the nature of one for discovery, the Court should follow the practice which formerly prevailed in the Court of Chancery, and is the present practice of the High Court of Justice on such applications, and grant it on being satisfied that it might supply evidence material to the issue in the action; but he stated that if the Court wished for some further evidence he was prepared to produce a witness who had seen and conversed with Mr. Druce on several occasions after the day of his alleged death. Mr. Bargrave Deane thereupon said that, if Mr. Statham called further witnesses, he should contend that he was entitled to examine witnesses in support of the whole of his case. To this Mr. Statham objected, as it would compel him to open his whole case before the trial of the issue in the probate action, and would necessitate the trial of the issue twice over. I thereupon suggested that the convenient course under the circumstances would be for an application to be made by Mr. Statham

to the Probate, Divorce, and Admiralty Division to direct letters of request to be transmitted to me from that Division, requesting me to issue a faculty for the opening and inspection of the coffin in the aid of the trial of the said issue in the Probate, Divorce, and Admiralty Division, upon the judge of the Division before whom the application was made being satisfied that it was a proper case for an order of discovery. I mentioned that this course would be in accordance with what was the practice of the Prerogative Court of Canterbury in similar cases, before the testamentary jurisdiction of the Ecclesiastical Courts was transferred to the Court of Probate—namely, that if a party in a testamentary cause in that Court considered that by the inspection of a coffin interred in consecrated ground in the diocese of London he might obtain material evidence in support of his case in the Prerogative Court, it would be competent to him to apply upon affidavits to the judge of the Prerogative Court (who, although he was an ecclesiastical judge in matters testamentary, possessed no jurisdiction quâ judge of the Prerogative Court over consecrated burial grounds in the diocese of London) to send letters of request to the judge of this Court, as having such jurisdiction, to issue in aid of the suit in the Prerogative Court a faculty authorizing the opening of the coffin for inspection, and that the judge of the Prerogative Court would grant such application on being satisfied that it was a proper case for discovery, and that the judge of this Court would, as a matter of comity, by a faculty have given effect to the letters of request. I said that by the Probate Act of 1857, s. 29, the practice of the Probate Court, where not altered by that Act or by the rules made under it, was, so far as the circumstances of the case would admit, to be according to the practice of the Prerogative Court, and that by the Judicature Act, 1875, s. 18, the rules and orders of Court in force in the Court of Probate were to remain in force, unless or until they were altered by the rules in the 1st schedule to that Act or by future rules or orders, and that no rule or order having been made under either of the Acts altering the practice in such a case as the present one, the practice of the

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Prerogative Court would apply. Mr. Bargrave Deane concurred in my suggestion, as will appear from the following passages extracted from the shorthand-writer's notes of the proceedings on the second day of the hearing of the suit before me. He said in answer to observations I made, "At present you have no evidence to contradict the evidence before you as the formal evidence that this gentleman died and was buried at the time shewn in the certificate." In answer to a further observation of mine, that the Court of Probate might on the application of the petitioner Mrs. Druce, plaintiff in the probate action, apply to this Court by letters of request to issue the faculty, he said, "If the Court of Probate does so, I have already said I have Mr. Herbert Druce's authority; I have not the authority of the other members of the family, yet I have no doubt I could get it to withdraw any opposition, and I do ask you, until a competent Court has ordered discovery suggesting this is a proper thing to be done in the interests of justice, to hold your hand." Again he said, "There is no order for discovery at the present moment under which my learned friend can in any sense say, in asking for the faculty, 'This is in consequence of the Court requiring discovery.' If he gets such an order from the judge—if Sir Francis Jeune, after hearing the facts, says, 'I think this is a case in which such a faculty should be granted,' I will not oppose it." I then observed, "You say that Mr. Statham should apply to the Probate Division for an order for letters of request to issue from the Probate Court requesting this Court to grant a faculty." "Yes, I say that exactly." I said, "I revert to the practice of the Prerogative Court." He answered, "Quite so, and specially for this form of discovery, which is not an ordinary order; and if the judge were to say, 'I think at this stage of the proceedings there ought to be this faculty granted, subject to your jurisdiction sitting as judge,' I shall not oppose it. I have Mr. Herbert Druce's authority to say so." Mr. Bargrave Deane then read out certain passages in the judgments delivered in the Divisional Court of the Queen's Bench Division in *Reg.* v. *Dr. Tristram* (1), in which it

(1) [1898] 2 Q. B. 371.

appeared that I had communicated to their Lordships that by the practice of this Court the parties whom he represented were entitled to a full hearing in opposition to the faculty, which would include the examination and cross-examination of witnesses on both sides. Mr. Statham objected to the latter course being now adopted, as it would involve his opening his whole case before the trial of the probate action and the trial of the same issue twice over. To this I said, "If you refuse to act upon Mr. Deane's suggestion to apply to the Probate Division for letters of request and produce further evidence, I should not receive it without giving Mr. Bargrave Deane an opportunity of calling as many witnesses as he thinks proper, and you will then have to go into the whole case." I suggested an adjournment to enable him to consider what course he would take. Upon the resumption of the hearing Mr. Statham announced that he was prepared to accept the suggestion of the Court, and to apply to Sir Francis Jeune, the President of the Probate, Divorce, and Admiralty Division, to see if he would consider this as a matter material to the issue in the probate action, and, if so, to make an order for letters of request to be transmitted to this Court, requesting it to issue a faculty for the opening and inspection of the coffin. Mr. Bargrave Deane acceded to this application being made, and I adjourned the further hearing of the case to enable Mr. Statham to make the application to Sir Francis Jeune. Mr. Statham made the application to the President by arrangement in chambers on August 3 last, and, after a lengthened argument by counsel on both sides, the President said, "I have not quite enough evidence to act upon; I want more evidence upon affidavit. I wish to deal with this case not as an exceptional case—although it is exceptional in some sense—but according to the ordinary principles of law." The further hearing of the application was adjourned to enable Mr. Statham to file an affidavit of a witness who would swear she had seen and conversed with Mr. Druce on several occasions after the date of the funeral, subject to her being cross-examined on her affidavit by Mr. Deane. The hearing of the case was resumed and concluded on August 8, and the result of the

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hearing is given in the following recital in the letters of request addressed to me by the President, and which have been lodged in the registry of the Court and have been accepted by me. [DR. TRISTRAM read the letters of request from the words "And whereas we in furtherance of your said order heard in chambers" down to the end of the same, and continued:—]

On November 12 Mr. Statham moved this Court to direct the faculty to issue as soon as the letters of request should have been lodged in the registry. Mr. Bargrave Deane objected to my giving effect to the letters of request on the ground (1.) that the evidence before the President was by ecclesiastical law insufficient to warrant my granting the faculty, and (2.) that the President had refused to allow him to examine witnesses to rebut the evidence of the witness produced by the petitioners, and upon whose evidence the President had relied for making this order for the letters of request. Mr. Statham's contention was that Mr. Bargrave Deane, having been a party to the point raised being referred to the President for his determination instead of being determined in this Court, it was incompetent to this Court to retry it, citing the decision of the House of Lords in *Burgess* v. *Morton* (1), in which case, the parties to an action having agreed to the matter in dispute being determined by two judges of the Divisional Court sitting in chambers instead of being tried in the ordinary way, it was decided by the House of Lords that no appeal lay from the decision of the two judges, the case having been decided extra cursum curiæ. But on referring to the shorthand-writer's notes of what occurred at the hearing as to this matter being referred to the President for his decision, I do not think it can be held that Mr. Bargrave Deane is debarred from taking objection to my acting on the letters of request. By ecclesiastical law a Chancellor is not bound to accept letters of request. There is a discretion vested in him to accept or refuse them. But in refusing to accept them he must exercise a judicial discretion. In the present case, in my judgment, I should not be exercising a judicial discretion, but an unwise discretion, in refusing to accept and act upon these

(1) [1896] A. C. 136.

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letters of request transmitted to me by the order of Sir Francis Jeune. As this case may travel up to the Courts of Appeal, it is my duty, sitting as a judge in a Court of First Instance, for the information and assistance of the Appellate Courts, to state the grounds on which I rest my decision, and this necessitates my referring to the shorthand-writer's notes of what occurred at the hearing of the case in chambers before the President. On the second day of the hearing an affidavit was tendered by Mr. Statham of a lady who in her affidavit and on cross-examination by Mr. Deane stated that she had known Thomas Charles Druce of the Baker Street Bazaar from girlhood, and had known him at least forty years ago; that he was a friend of her father's, and used frequently to visit him, and that her father used to visit him at the Baker Street Bazaar, and that she had accompanied her father twice to the bazaar, when he went to see him there; that she heard of his illness and of his death from her father, and that her father attended the funeral in 1864; that Mr. Druce called at her father's apartments in 1866, and when shewn in, "On seeing him she was startled, and said to him, 'I thought you were dead and buried,' and that he shook his head and said, 'Oh, no more of that—no more of that, please.'" That he called on her father frequently afterwards, and that she saw him several times in 1875, and the last time she saw him was in 1876; that she had never seen Mrs. Anna Maria Druce; and that on hearing of the Druce case she mentioned what she knew of Mr. Druce to a gentleman, who took her to Mrs. Druce's solicitors, who took down her evidence. She recognised the photograph which had been given by Mr. Druce to one of his employees two years before the funeral, and which had also been recognised by Dr. Forbes Winslow and an attendant in his asylum, as the likeness of a gentleman who had been in his asylum prior to 1879 under the name of Dr. Harmer. At the conclusion of her evidence, Mr. Bargrave Deane said he was willing to call evidence to contradict it. The President said that was not part of the arrangement, as he was not going to try the case, and continued: "What I said was that I should require to have substantial primâ facie evidence to it, and I have had a

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witness before me who has sworn to it most positively. She has been examined and cross-examined. Of course, if what she says is true, it is conclusive. It may be said she is mistaken; but still it is clear evidence, which lays the foundation of a case." Mr. Bargrave Deane afterwards handed in the affidavits of the doctor and nurse who attended Mr. Druce in December, 1864, in contradiction of the evidence of this witness, and the President, in giving his decision, said: "I have read this evidence, and nobody can dispute, if it is true, it is very strong evidence indeed. But it seems to me that what I have to do to-day is to determine two things—first, is there any substantial suit in this Court? From what I have been told there undoubtedly is, dependent upon the question whether the probate of this will is good; and, secondly, I must be satisfied that there is a substantial case in support of it to enable any one to go out of the way to obtain further evidence in support of it. That is all the Court ought to do. I cannot undertake to say whether the petitioner's evidence when produced will outweigh your evidence or not; but I think the petitioner has a right to have that evidence and to bring it before the Court, and it is nothing to say that you have very strong evidence on the other side. You may have. The case cannot be tried until we have all the evidence on both sides. We cannot have that until this important fact is determined. Under these circumstances, I think there is a material issue, and that the evidence to be obtained by the opening of the coffin will be material evidence on that issue, and that the petitioner has made out a right to have the aid of the Court on obtaining it." The petitioner's application for letters of request was thereupon granted.

After considering the evidence given before the President, and the grounds upon which his Lordship rested his decision, I feel it to be my duty to reject Mr. Bargrave Deane's application to examine witnesses in this Court, and in the exercise of my discretion to decree the faculty to issue after the expiration of fifteen days from this date; and in so doing I consider I shall be giving effect to the intention of the Judicature Acts that the Court having seisin of an action is the Court to determine

all questions incident to its trial, including applications for discovery.

There remains a further question on which it will be my duty to give my opinion, namely, whether by s. 25 of the Burials Act, 1857, this faculty can be safely acted upon without a licence from the Home Secretary. Mr. Bargrave Deane, at the last sitting of the Court, stated that it was not his intention to make any observations on this question before the Court. But Mr. Statham asked me to consider it, and to give my opinion on it for the guidance of the petitioners, which I will now do. The words of the section bearing upon the matter are as follows: [DR. TRISTRAM read the section down to the words "Secretary of State," and continued:—]

From the evidence given by the secretary of the cemetery company, at the bottom of the vault there are three coffins: those of Mr. Druce and his son—the petitioner's husband—side by side, and a child's coffin at their feet, and these coffins are covered with a stone slab, upon which the coffin of Mr. Druce's widow is placed. I am not asked to authorize Mr. Druce's coffin or his remains to be disturbed or moved, but to authorize the lid of his coffin to be temporarily removed for the inspection of the body in the coffin. The Divisional Court in their decision on the question before referred to held that on general principles and on authority the ecclesiastical judges have jurisdiction to order by faculty the opening and inspection of a coffin for the purpose of identification. According to the cases on the construction of statutes, this Court can only be ousted of such jurisdiction or have a limitation placed upon it by clear words in an Act of Parliament, and a new jurisdiction cannot be constituted except by equally clear expressions. The 25th section of the Burials Act, 1857, contains no such words or expressions to effect the one or other of these objects. But the coffin of Mr. Druce's widow is placed on the slab immediately over the coffin of her husband, and it may or may not, according to the evidence of the secretary to the cemetery company, be necessary to move it aside in the vault for the purpose of the inspection required. This Court, having authority to authorize by faculty the temporary removal of the lid of Mr. Druce's

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coffin, is clearly entitled to authorize anything to be done in consecrated ground necessary to effect that purpose. It is an every-day practice in authorizing the enlargement of a church situated in a churchyard on a site where there are graves to authorize by faculty a coffin to be partly set aside, or wholly removed to another place in the churchyard. What the Ecclesiastical Courts are prohibited from doing by this section is the removal of human remains from consecrated ground to unconsecrated ground, over which they have no jurisdiction. By ecclesiastical law they have no power to authorize the removal of bodies from consecrated to unconsecrated ground. But this section enables this to be done on the licence of a principal Secretary of State being obtained.

I am of opinion that it is not necessary for Mrs. Druce to obtain the Home Secretary's licence to enable her to act upon the faculty she asks for. The faculty will therefore issue without the insertion of a clause that it is to be acted upon subject to a licence being obtained from a principal Secretary of State. The interveners will be condemned in all costs incurred by the petitioners consequent on their opposition to the granting of the faculty.

The terms of the faculty will be settled in chambers. (1)

Solicitors for petitioners: *F. J. Macarthur & Co.*
Solicitors for interveners: *Freshfields & Williams.*

(1) The minute of the decree subsequently entered in the registry was, so far as material, in terms as follows:—

The judge having heretofore heard counsel on behalf of the petitioners and interveners, and having accepted and perused the letters of request from the Right Honourable the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice addressed to him requesting him to grant a faculty to the petitioner, Anna Maria Druce, in aid of the administration of justice in a probate action depending in the said Probate, Divorce, and Admiralty Division between her and the intervener, Alexander Young, as far as he could or might by his authority, in accordance with the practice of this Court authorizing by way of discovery the opening and inspection of the said coffin of the alleged deceased Thomas Charles Druce, contained in a vault in the consecrated portion of the North London Cemetery at Highgate, in the diocese of London, and having perused and considered a report of the proceedings before the said President in chambers on an application made by counsel for the petitioner to order

the letters of request to be issued and the decision of the President thereon, rejected the applications made by counsel for the interveners to refuse to issue the said faculty or to allow witnesses to be produced and examined in opposition to the granting of the said faculty, and decreed a faculty to issue after the expiration of fifteen days from the 25th day of November, 1898, to the petitioners as prayed, and condemned the interveners in the costs incurred by the petitioners consequent on their opposition to the granting of the said faculty, and directed, with the consent of counsel for the interveners, that it be referred to the registrar to fix the amount to be deposited in the registry by or on behalf of the petitioners as security for the payment of the costs of the exhumation, including the estimated costs of the cemetery authorities and of the attendance of the person appointed to make an independent report to the Probate Court, and of the expense of opening the vault and of restoring the same when the coffin is replaced to as good a condition as the vault was in at the time of the opening thereof, together with the costs of providing temporary barriers against the invasion of the locus in quo by the public, and as security also for the court fees and other costs of and incidental to the petition, and properly payable by the petitioners. And the judge further directed that the balance of any sum so deposited by or on behalf of the petitioners after payment of the costs and court fees payable under the said order be paid to Messrs. F. J. Macarthur & Co., the petitioners' solicitors.

Messrs. Freshfields & Williams, with all due reverence, protested of a grievance and of appealing, and instantly appealed therefrom.

[This appeal was not proceeded with.]

Subsequently to the making of the above decree, further proceedings in prohibition in connection with this case distinct from those reported in *Reg.* v. *Dr. Tristram*, [1898] 2 Q. B. 371, were taken in the Queen's Bench Division at the instance of the London Cemetery Company, who had been, by a citation issuing out of the Registry of the Consistory Court of London on December 14 last, cited to shew cause why the Court should not insert in the faculty decreed to be issued as above stated, "An order on the company, as custodian of the consecrated ground of the Highgate Cemetery, to execute the directions contained in the faculty within such time as the Court might appoint, or to admit the petitioner A. M. Druce and her agents to the consecrated portion of the cemetery in which the vault in question is situate, and to execute the directions contained in the faculty, and also to admit such officer or officers as the President of the Probate, Divorce and Admiralty Division might nominate to attend the execution of the faculty." These proceedings, in which a rule absolute for a prohibition was granted by a Divisional Court of the Queen's Bench Division on February 17 last, are reported in the *Times* newspaper for February 18 last.

C. F. J.

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*Feb.* 6.

## In the Goods of RATCLIFFE.

*Administration—Limited Administration—Trust Fund.*

The Court will grant letters of administration to the cestui que trust of a trust fund, limited to that fund, after the death of the trustee, on the consent of his personal representatives.

*Pegg* v. *Chamberlain*, (1860) 1 Sw. & Tr. 527, followed.

Application for administration limited to a trust fund.

Edward Rhodes Ratcliffe died in 1890. At the date of the application a sum of 240*l.* India 3½ per cent. stock stood to his credit in the books of the Bank of England as a trustee, the applicant Mary Ratcliffe being his cestui que trust and entitled to the principal and interest under the will of John Ratcliffe who died in 1877.

Edward Rhodes Ratcliffe, by his will dated in 1870, bequeathed all his goods, estates, and effects to his wife Margaret Ratcliffe, whom he appointed his executrix. Probate of his will was granted to Margaret Ratcliffe.

Margaret Ratcliffe died in 1898, having by her will dated in 1890 bequeathed all her real and personal estate to Elizabeth Hilton, whom she appointed her sole executrix. Probate of her will was granted to Elizabeth Hilton.

Elizabeth Hilton died in 1898 intestate, leaving a brother and three sisters her next of kin. Letters of administration to the estate had been granted to one of Elizabeth Hilton's sisters, who, with Elizabeth Hilton's other next of kin, were, upon the failure of the chain of executorship, the personal representatives of the deceased. They had each consented to the application.

*Barnard*, for the applicant. The application should be granted, as in accordance with the practice of the Prerogative Court, as stated by Sir C. Cresswell in *Pegg* v. *Chamberlain*. (1)

Gorell Barnes J. I think that, on the authority of the case cited, administration may be granted, limited as prayed.

Solicitors: *Druces & Attlee.*

(1) 1 Sw. & Tr. 527.

H. D. W.

## THE INCHMAREE.

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*Feb.* 14, 15.

*Admiralty—Salvage—Discontinuous Services—Agreement—Tender—Authority of Master of Salving Vessel.*

Where the services of a salvor were discontinuous, and an amount was tendered and paid into court representing the sums agreed upon, by the master of the salving vessel, with the master of the salved vessel, as the reward to cover valuable services rendered prior to the agreement, as well as the successful services subsequently rendered:—

*Held*, by Phillimore J., that the tender must be rejected, and a salvage award made in respect of the services prior to the agreement, as the owner and crew of the salving vessel had acquired vested rights which the master of the salving vessel had no authority to bargain away, but that the amount fixed by the agreement must stand in respect of the subsequent services.

Consolidated Actions of Salvage.

The plaintiffs were the owners, masters, and crews of the steam-tugs *Spurn*, *Seagull*, and *Janet*. The defendants were the owners of the steamship *Inchmaree*, her cargo and freight.

The case is reported on the question of the effect of a salvage agreement dealing with past and future services, where the services are discontinuous.

The material facts were shortly that:—

On January 9, 1899, the defendants' screw steamship *Inchmaree*, of Liverpool—of 3134 tons net, and 4763 tons gross, register, with engines of 459 horse-power nominal, and thirty-six hands, from Baltimore to Hull, with a cargo of wheat, and of a total value of 72,908*l.*—had arrived in the Humber within a short distance of her destination, when, in rounding a bend of the river, she took the ground on the Middle Sand.

The *Spurn*—a paddle steam-tug valued at 1800*l.*, of fifteen tons gross register, engines of 32 horse-power nominal, with a crew of four hands—and the *Seagull*—a screw steam-tug valued at 4000*l.*, of sixty-six tons gross register, engines of 40 horse-power nominal, with a crew of five hands—belonging to two of the plaintiffs, came up, and took hold of the *Inchmaree*, but the *Spurn's* rope parted, and that tug, having sustained damage in

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the attempt to tow, then left, whilst the *Seagull* succeeded in turning the head of the *Inchmaree* round, after which she remained fast on a falling tide.

The *Janet*—a screw steam-tug valued at 6000*l.* of ninty-nine tons gross register, engines of 90 horse-power nominal, a crew of six hands, belonging to one of the plaintiffs—then took hold, but the rope parted.

A portion of the cargo of the *Inchmaree* was taken off in lighters, and, on the tide making, the *Seagull* and *Janet* again made fast, and moved the vessel somewhat so as to prevent her from becoming embedded, but otherwise without effect. On the next tide making, both tugs prepared to tow, but their ropes were slipped by those on board the *Inchmaree*, and their masters hailed to come on board. There was considerable conflict in the evidence as to what passed between the parties, but it appeared that the masters of the two tugs were told that they would not be allowed to take hold again except under written agreements. They accordingly signed—under, as the Court found, a misapprehension as to the sums named including past services—separate and similar documents in the following terms :—

"Hull, 10th January, 1899.

"I, the undersigned master of the tug *Janet*, on behalf of myself, and the owners and crew of such tug, do hereby agree to accept the sum of 20*l.* per tide, and 150*l.* when floated, in full for all claims for rendering assistance to the stranded vessel *Inchmaree*. The agreement to apply as well to past as future services, and such sum to be in full for all salvage and other claims on ship cargo and freight."

The ship was with some difficulty, as detailed in the judgment, ultimately got off by these two tugs with the assistance of two others separately settled with.

The defendants tendered and paid into court the sum of 420*l.*, being 60*l.* for three tides, and 150*l.* for each of the two tugs.

*Aspinall, Q.C.*, and *F. Laing*, for the plaintiffs. The position of the *Inchmaree* was one of danger, and but for the valuable

services of the plaintiffs, she would have sustained severe damage, or possibly have been totally lost. For the services of the *Seagull* and *Janet*, the tender based on the written agreements is inadequate. The parties were not ad idem, so that the agreements do not constitute binding contracts, and the Court will, therefore, disregard them, and reward the tugs for one entire salvage service.

[PHILLIMORE J. No. The *Seagull* and *Janet* would not have been further employed if their masters had not signed the agreements.]

If these two tugs had not been employed those in charge of the *Inchmaree* would have had to make use of the services of other tugs, and, therefore, these two tugs may claim such an amount of remuneration as would have been paid to others for the services which they performed, and which were not only accepted but successful.

Secondly, the masters of these tugs had no authority to sign these agreements, for though the master of a salving vessel presumably is the agent of his owner, as well as of the crew, so as to bind them by contract in respect of services about to be performed: *The Nasmyth* (1)—the master has no power, after the services have been performed, to bargain away, without their consent, the rights acquired by the crew of the salving vessel: *The Britain* (2); *The Sarah Jane* (3); and, in this case, no authority can be implied on behalf of the owners of the tugs, for they were close by on shore and could have been communicated with by the agents of the *Inchmaree*. The agreements will, therefore, be treated by the Court as not binding.

[PHILLIMORE J. The agreements may be bad as to the services rendered before, but good as to the services rendered after they were signed.]

If the agreements are bad in part, they are bad altogether. They should, therefore, be set aside, and the tender overruled.

*Pyke, Q.C.*, and *Dawson Miller*, for the defendants. First, as to the parties not being ad idem. The salvage services were

(1) (1885) 10 P. D. 41. (2) (1839) 1 Wm. Rob. 40.
(3) (1843) 2 Wm. Rob. 110.

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performed in the Humber, with a number of other tugs about, whose masters were ready and willing to render the required towage which it was, at that time, obvious would result in bringing the vessel off the ground. The owners of the *Inchmaree* were not under any obligation to continue the employment of the two tugs, and could decline to allow them to take hold again except on terms. The masters of the *Seagull* and *Janet*, therefore, signed the agreements in order to be allowed to go on with remunerative work which, otherwise, they would have had to leave to others. The sum of 150*l.* for the services to be performed was suggested by the masters of the tugs themselves, and it will be conceded that it is ample remuneration for the services after the agreements were signed. Considerable discussion took place as to the remuneration for the past services. In the view of the defendants those services were slight, and would be well rewarded at the rate of 20*l.* per tide. It is submitted that the evidence shews that that view was shared in by the salvors themselves, as the masters of the two tugs discussed the matter together before separately signing the documents, which are clear and precise on this particular point.

Secondly, there is no authority for the proposition that the agreements are divisible, so that the part for future services can be held good, and the part relating to past services set aside as bad. Assuming that the master of a salving vessel has no authority to bind the crew in respect of services already performed, still, as the *Inchmaree* was not salved at the time the agreement was entered into, there was nothing to prevent the master of each tug making one agreement dealing with the past services, which were of a trifling character, in conjunction with the future services, in respect of which, it is admitted, he may bind both his owners and the crew.

*Aspinall, Q.C.*, in reply.

[Reference was made to *The Kingalock*. (1)]

PHILLIMORE J. This case is not free from difficulty. The service which is the subject of the plaintiffs' claim occupied three tides, and consisted, firstly, in taking hold of the vessel as

(1) (1854) 1 Spinks E. & A. 263.

she was grounding and slewing her round till she was brought head to tide and prevented from lying broadside to the very strong tide in the Humber; secondly, in shifting her on the next tide and dragging her forward so as to prevent her from settling into the sand; and, thirdly, in towing her off down river, and turning her round so as to keep her from grounding again this time on the north shore, and finally bringing her into dock. In this third operation two other tugs were also engaged, but they have been separately remunerated.

Now, it is not disputed, as regards the *Seagull* and the *Janet*, the two principal claimants, that they did render some service—though it is said to have been a small service—on the first and second tides, and that they did render service in helping to get the vessel off on the third tide. The only matter with regard to the third tide which is disputed is the subsequent danger of the vessel grounding on the north side.

The defendants also plead that an agreement was signed by the two tugmasters for 210*l.* apiece, and they have accordingly tendered and paid into court the sum of 420*l.*

Dealing first with the general nature of the services, the Elder Brethren are of opinion that upon the whole the plaintiffs' account is more accurate than that given by the defendants, for they think that the vessel was turned to the northward, as the tugmasters and the dockmaster say, on the first occasion when touching the ground; and they advise me that valuable service was rendered by the tugs in getting the vessel's head to tide and preventing her from lying broadside in the scour of the tide. They also think that she was shifted on the second occasion, and that she was in danger of going on to the Hebbles just before she was got into dock, and that the two plaintiffs rendered valuable services then. They further think, and I agree, that the *Spurn* was employed and rendered some service—that she rendered the service which she was employed to do, namely, to make fast and tow, but the rope belonging to the *Inchmaree* broke by no fault of the tug.

The difficulty I have felt in this case arises from the strong body of evidence on both sides as to the transaction which took place before the tugs finally got fast on the last tide. By the

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documents which have been produced both tugmasters purport to have agreed to accept the sum of 20*l.* per tide, and 150*l.* when the ship was afloat, in full of all claims for rendering assistance to the *Inchmaree*; and the agreement was to apply as well to past as to future services. There is no doubt that they signed these documents, and I am of opinion that the nature of these documents was not misrepresented to them. They may have believed, but they were not fraudulently led to believe, that they did not contain a contract for past as well as future services. That puts the plaintiffs in very considerable difficulty; but though I take the view that the defendants' servants, the master and the ship's broker, honestly believed that the contract was as appears on paper, I have also come to the conclusion that the tugmasters did not understand it. The matter was one of hurry and emergency. There was a great deal of bargaining and discussion, and the question was complicated by the position of the other two tugs, whose masters seem to some extent to have waived their rights in favour of the two tugs first in the field. It may be difficult to come to the conclusion that two people of the capability and vigour of those two tugmasters should have made a mistake. But I was impressed by their honesty in other respects; I thought them trustworthy; and I have come to the conclusion that I cannot disbelieve them, and, although the burden was very strongly against them, I hold that they did not agree, or intend to agree, to sell their past rights.

There is the further question of the tugmasters' authority. My view about that matter is that, where there is one continuous service, and some small step has been made in that service—a step which of itself would not give any right to salvage even though the vessel should be subsequently salved—and at some epoch the master of the salved vessel says, "Now, let us go no further without a bargain, to cover what you have done as well as what you are going to do"—then I think it is within the scope of the authority of the master of the salving vessel to enter into a bargain to cover both the past as well as the future services; because the past service does not stand by itself—it has not by itself given any right, that is to say, in such a case there is no assessable value to give to the past service. But where the

service is discontinuous with hours between, in which nothing is done at all, and where the past services give—as in this case—vested rights, because if the plaintiffs' tugs had not towed the *Inchmaree* off and some other salvor had done so, the plaintiffs still would be entitled to payment, then I do not think that the master of the salving vessel has a right to bargain away the rights of his owner, or that of the crew, for those past services. Still less do I think that he has the right to make it part of the condition upon which he and his co-salvors are to be employed for the future services. That is a kind of "truck" which seems to me to be repugnant to public policy. I think that in this case the masters had no authority to bargain away the past rights of their co-salvors for the sake of being allowed to render the rest of the service.

I, therefore, come to the conclusion that that part of the contract cannot stand, both because it was not agreed to, and because the plaintiffs' masters had no authority. But I do not see why the other half of the contract cannot stand by itself. I do not see how the plaintiffs can complain of getting the sum which their masters were willing to agree to beforehand to take for the chance of rendering the future salvage service; and I do not see why the defendants should complain of paying that sum which they agreed to pay for the future service.

In the result, I hold that the agreements are binding in regard to the remuneration for the last tide, and all I have to do now is to assess the amount of remuneration for the plaintiffs' services on the two previous tides, together with the general remuneration to the *Spurn*. Taking all the circumstances into account, and after consulting the Elder Brethren on the nautical questions involved, I am of opinion that the tender must be rejected, and that a proper award will be: to the *Seagull*, 290*l.*—140*l.* for the first two tides and 150*l.* for the last one; to the *Janet* a like sum, and to the *Spurn* 30*l.*, making a total of 610*l.*, with costs.

Solicitors for plaintiffs: *Pritchard & Sons, for A. M. Jackson & Co., Hull.*

Solicitors for defendants: *Thomas Cooper & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

1899
*Feb.* 20.

## THE GLANYSTWYTH.

*Admiralty—Compulsory Pilotage—Trinity House Outport District—Coasting Trade—Trading from Port in Great Britain to Port North and East of Brest—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 622, *sub-s.* 1; *s.* 625, *sub-ss.* 1, 3.

By s. 622, sub-s. 1, of the Merchant Shipping Act, 1894, pilotage is compulsory within the Trinity House outport districts.

By s. 625 ships, when not carrying passengers, are exempted from compulsory pilotage in the Trinity House outport districts if (sub-s. 1) employed in the coasting trade of the United Kingdom, or (sub-s. 3) trading from any port in Great Britain within . . . . any of the Trinity House outport districts to . . . . any port in Europe north and east of Brest.

A British ship, without passengers, left Gaza in Asiatic Turkey with a cargo of barley, part of which was to be delivered at the port of Ipswich (a Trinity House outport district), and the remainder at the port of Leith in Scotland. She discharged at Ipswich the portion of cargo to be there delivered, and was proceeding down the river Orwell, within the limits of the port of Ipswich, on her voyage to Leith, when a collision occurred, for which her owners would be responsible if she was not compulsorily in charge of the Trinity House pilot on board:—

*Held*, by Sir F. H. Jeune P., that pilotage was compulsory, as the vessel was not at the time either employed in the coasting trade within the meaning of sub-s. 1, or trading from a port in Great Britain to a port in Europe north and east of Brest within the meaning of sub-s. 3 of s. 625 of the Merchant Shipping Act, 1894.

*The Winestead*, [1895] P. 170, followed.

Special Case.

The plaintiffs were John Slater and others, owners of the British ketch *Sarah Lizzie*. The defendants were the owners of the British steamship *Glanystwyth*.

The question for the opinion of the Court was whether, at the time of a collision between the steamship and the ketch, the *Glanystwyth* was, as the defendants contended, compulsorily in charge of a pilot under s. 622 of the Merchant Shipping Act, 1894 (1), or whether the vessel was, as the

(1) 57 & 58 Vict. c. 60, s. 622, sub-s. 1: "Subject to any alterations to be made by the Trinity House, and to the exemptions under this part of this Act, pilotage shall be compulsory within the . . . . Trinity House outport districts."

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plaintiffs contended, exempted from compulsory pilotage under s. 625 of the same Act. (1)

The material facts were shortly as follows:—

The *Glanystwyth* is a steamship of 1824 tons gross register employed in the Mediterranean and Atlantic trades. On September 1, 1898, she left Gaza, in the province of Beyrout, Asiatic Turkey, with about 2800 tons of barley, 1400 tons of which were, under the terms of a bill of lading, to be delivered at the port of Ipswich, and 1400 tons under another bill of lading to be delivered at the port of Leith in Scotland. On October 12 the vessel arrived at Ipswich, discharged the barley to be there delivered, and, on October 20, was proceeding, without passengers, but in charge of a duly licensed Trinity House pilot for the port of Ipswich, down the river Orwell, on her voyage to Leith, when she came into collision with and damaged the ketch *Sarah Lizzie* lying at anchor.

Pin Mill, where the collision occurred, is within the limits of the port of Ipswich, which is one of the Trinity House outport districts within the meaning of s. 618 of the Merchant Shipping Act, 1894. (2)

*Pyke*, *Q.C.*, and *A. E. Nelson*, for plaintiffs. The *Glanystwyth* was exempt from compulsory pilotage, as she was, at the material time, carrying cargo on a voyage from Ipswich to Leith, that is to say, "employed in the coasting trade of the United Kingdom" within the meaning of s. 625, sub-s. 1, of the Merchant Shipping Act, 1894; for it is not necessary that she should be employed in the regular coasting trade, the word "regular" in s. 59 of the Pilotage Act, 1825 (6 Geo. 4, c. 125), having been designedly omitted in subsequent Acts.

(1) Sect. 625: "The following ships, when not carrying passengers, shall . . . . be exempted from compulsory pilotage in the . . . . Trinity House outport districts; (that is to say)

"(1.) Ships employed in the coasting trade of the United Kingdom.

* * * *

"(3.) Ships trading from any port in Great Britain within the London district or any of the Trinity House outport districts to the port of Brest in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man."

(2) See *Hadgraft* v. *Hewith*, (1875) L. R. 10 Q. B. 350, decided on the similar section (370) of the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), repealed.

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It is true that in *The Winestead* (1) it was held that a vessel proceeding from London with part cargo and ballast to Cardiff, there discharging her ballast, and taking in the remainder of her cargo for Venice, was a foreign-going ship bound to employ a pilot; but Bruce J. in that case was careful to point out that all he intended to decide was that "a vessel while engaged in carrying cargo destined to a foreign port is not within the words of the exemption 'ships employed in the coasting trade.'" That decision, therefore, does not cover this case, and the learned judge would probably not have distinguished *Courtney* v. *Cole* (2) and felt himself bound to follow two earlier cases (3) if the judgment in *The Rutland* (4) had then been delivered. In that case the House of Lords held that a ship, which with cargo from the river Plate to Rotterdam, and cattle for London, discharged the cattle in London and proceeded with the cargo, and no passengers, to Rotterdam, was exempt from compulsory pilotage in the London district as being within sub-s. 3 of s. 625. Applying the words of Lord Herschell (5) to the present case, the *Glanystwyth* arrived at the port of Ipswich on a trading adventure; she there discharged part of her cargo. She left Ipswich with cargo on a voyage to Leith, and would be exempt from compulsory pilotage under sub-s. 3 because she was trading from a Trinity House outport district to a port in Europe north and east of Brest. The vessel was, therefore, exempt either under sub-s. 1 or under sub-s. 3.

*Carver, Q.C.*, and *Scrutton*, for the defendants. Pilotage was compulsory on the *Glanystwyth*, for the case is covered by *The Winestead*. (1) It cannot make any difference in principle whether, as in the present case, the vessel is coming from a foreign port or, as in *The Winestead* (1), going to a foreign port: in both cases they are foreign-going ships, and, therefore, not employed in the coasting trade within sub-s. 1 of s. 625. If the argument of the plaintiffs is to hold good, then vessels

(1) [1895] P. 170.
(2) (1887) 19 Q. B. D. 447.
(3) *The Agricola*, (1843) 2 Wm. Rob. 10; *The Lloyds or Sea Queen*, (1863) Br. & L. 359.
(4) [1897] A. C. 333.
(5) [1897] A. C. at p. 336.

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calling at Falmouth for orders, or putting into Plymouth for passengers, would be employed in the coasting trade, and entitled to claim exemption from pilotage; but such a contention has never been admitted: see *The Winston* (1); nor does the *Glanystwyth* fall under sub-s. 3 as a vessel trading to a port north and east of Brest, for, as pointed out by Bruce J. in *The Winestead* (2), "Europe" is used in the exemption in the Merchant Shipping Act, 1854, in contradistinction to the United Kingdom, as is clear from the Order in Council of December 21, 1871, now embodied in the Merchant Shipping Act, 1894. The case of *The Rutland* (3) is, therefore, not in point.

*Pyke, Q.C.*, in reply. Vessels calling for orders at Falmouth do not go into the port, but only signal; they are therefore not coasters. Vessels actually going into a channel port to take in passengers, and, it may be, some cargo, such as the Peninsular and Oriental Company's steamers, may become coasters in respect of the voyage between two ports in the United Kingdom.

[Reference was made to the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 140, 142; the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21); also to the use of the words "employed solely in the coasting trade" in s. 438, and "employed in the coasting trade" in s. 441; and the definitions of "foreign-going ship" and "home-trade ship" in s. 742 of the Merchant Shipping Act, 1894; *The Sutherland* (4); *The Wesley.* (5)]

THE PRESIDENT (SIR F. H. JEUNE). In this case I have to put an interpretation upon the Merchant Shipping Act, 1894, and I regret that, in a matter so eminently practical, and from which such important consequences follow, as taking, or not taking, a compulsory pilot, the rules are not more simple.

The question—which arises out of a collision which took place between the ketch *Sarah Lizzie* and the steamship

(1) (1884) 9 P. D. 85.
(2) [1895] P. 170.
(3) [1897] A. C. 333.
(4) (1887) 12 P. D. 154.
(5) (1861) Lush. 268.

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*Glanystwyth* in the river Orwell—that is, within an outport district of the Trinity House—is whether the *Glanystwyth* was or was not bound to have a compulsory pilot on board. [The learned judge then dealt with the facts already set out, and continued :—]

The *Glanystwyth* was, therefore, a vessel with a cargo partly for one port in the United Kingdom, and partly for another port in the United Kingdom, and having done half her duty in discharging at Ipswich, she was proceeding to do the other half when the collision occurred.

Two questions are raised. The first is, was the vessel under those circumstances a ship employed in the coasting trade of the United Kingdom within sub-s. 1 of s. 625 of the Merchant Shipping Act, 1894, or, if not, was she a ship brought within the exemption contained in sub-s. 3 of that section ?

Was she a ship employed in the coasting trade? This appears to me to be the very question which was raised before Bruce J. in the case of *The Winestead* (1), and, although I have carefully considered the distinction sought to be drawn between that case and the present, I cannot see any distinction. In *The Winestead* (1) a vessel was proceeding down the Thames from London, with a cargo for Venice, or some other Mediterranean port, and she was going, partly in ballast and partly with cargo, to Barry, where she intended to take the remainder of her cargo. Whilst proceeding down the Thames she came into collision. She was going, with a part of her cargo on board, ultimately to Venice, but primarily to Barry with the intention of completing her cargo, and then going on her outward voyage. Is there any distinction between that case and the present? I can see none. In the present case the vessel had come from a foreign port, and in the case of *The Winestead* (1) she was going to a foreign port. It appears to me that, if one was a coasting vessel, the other was also. Bruce J. held in *The Winestead* (1) that that vessel did not come within sub-s. 1, and even supposing I agreed with the arguments urged on behalf of the plaintiffs, I should feel myself bound to follow a case decided in this Court and not

(1) [1895] P. 170.

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made the subject of appeal; but I agree with the decision of Bruce J. notwithstanding the fact that there has been a subsequent case which went to the House of Lords and which is said to have overruled, or at least to have taken a different view of the law than that expressed in *The Winestead*. (1) No doubt Bruce J. founded his judgment partly on the decisions of Dr. Lushington, and partly on the analogy of the Customs Consolidation Act, 1876. I am disposed to think that the first ground is considerably stronger than the other. The decisions of Dr. Lushington appear to me to be in point, and in the cases of *The Agricola* (2) and *The Lloyds* (3) the vessels were in positions similar to that in *The Winestead* (1), and in both those cases Dr. Lushington held that they were not engaged in the coasting trade. It is true, as Bruce J. said, that those decisions were given a long time ago, and that Acts of Parliament have been passed since; but it seems to me that those decisions are binding upon me just as they were binding upon Bruce J., and, beyond that, it seems to me that the words of the section point to the decision which Bruce J. gave.

There appears to me to be a distinction—a fair distinction—between the words of the 1st and of the 3rd sub-sections, "ships employed in the coasting trade of the United Kingdom" and "ships trading from any port in Great Britain to" ports mentioned in the 3rd sub-section. Does not the 1st sub-section mean, necessarily, ships habitually employed in the coasting trade, and only those which come within the ordinary expression of "coasters"? There is no definition in the Act of the coasting trade; but when ss. 438 and 441 are looked at, although they are sections which apply to the load-line, I think that the words "coasting trade" were intended to be used with regard to habitual or regular traders. Sect. 441 provides that where a ship employed in the coasting trade is required to be marked with a certain disc, she shall be so marked before the ship proceeds to sea from any port, and so on, and that, I think, must mean a vessel employed in the coasting

(1) [1895] P. 170. (2) 2 Wm. Rob. 10.
(3) Br. & L. 359.

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trade in the regular way, and not to a vessel which, under the circumstances of her particular trade, is engaged in trading which brings her to one port in the United Kingdom, and then to another in the United Kingdom.

I find it difficult to accept the argument that a Peninsular and Oriental Company's steamer or a Cape liner calling at a port in the Channel and dropping passengers and part of her cargo and then proceeding to London, or vice versâ, becomes—under any fair meaning of the words—at the material time a ship employed in the coasting trade of the United Kingdom; yet counsel for the plaintiffs admitted, fairly enough, that, according to his argument, a P. and O. steamer starting with passengers from London to the East, and calling for more passengers, as is usually the case, I believe, at Plymouth, is between London and Plymouth in the coasting trade. To say that, under those circumstances, a P. and O. vessel could claim exemption in the river Thames appears to me to be an impossible contention; but, then, it is said that the view taken by the Courts—especially by the House of Lords—in the case of *The Rutland* (1) puts a different colour upon the matter. There may be something in the argument, but it does not appear to me to govern this case. In the case cited it was held that the word "trading" applied to a vessel which, having come to London, went on from London to Rotterdam in the course of her trade. It was held that she was a vessel in the course of her voyage trading from one port in the United Kingdom to a port north and east of Brest. In the same way it is suggested that a vessel trading, in that sense of the word, between London and Cardiff, or Ipswich and Leith, is a vessel engaged in the coasting trade; but, as I have already pointed out, I think there is a difference between the language of the sub-sections. It is quite true that in the case of *The Sutherland* (2), Sir James Hannen used words which rather point to an enlarged view of the expression "coasting trade"; but I do not think that his opinion can be carried so far as to include a case like the present. It is not necessary to say that the sub-section applies only to vessels habitually engaged in the

(1) [1897] A. C. 333. (2) 12 P. D. 154.

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coasting trade, but I think that the trade at the moment being carried on must be substantially a trade between two or more ports of the United Kingdom. The incidental expression which Sir James Hannen used seems to me to be reconcilable with the view I am now taking.

I have already said that I think the decision of Bruce J. in *The Winestead* (1) rests more strongly upon the decisions of Dr. Lushington than upon the Customs Consolidation Act, and I doubt whether the definitions of that Act really apply; nor, in considering these sections, do I think it right to go into any question of principle, because it is extremely difficult to lay down any principle upon which the Legislature acted. Dr. Lushington did, however, take the view, in regard to ships in the coasting trade, that the reason for the enactment may have been that the masters of vessels in the coasting trade know the inland waters which they frequent, and, therefore, do not require the services of a pilot. I do not, however, lay stress on this, because I believe that the object of the Legislature in these exemptions was to benefit those who were exempted; compulsory pilotage being regarded as a kind of impost.

On the whole, therefore, it seems to me that the true view to take of the sections is that which has been taken by Bruce J., and I propose to follow *The Winestead* (1), both because I think myself bound by it, and because I agree with it.

There is the further point that this vessel comes within the meaning of the exemption of sub-s. 3, namely, "ships trading from any port in Great Britain within the London district, or any of the Trinity House outport districts, to the port of Brest, in France, or any port in Europe north and east of Brest, or to the Channel Islands or Isle of Man." That is again a point which came before Bruce J. in *The Winestead* (1), and he held that the word "Europe" in the sub-section meant the continent of Europe, and did not include the United Kingdom. I think he was right; for it seems clear to me that Europe in that sub-section must be taken to mean the Continent. Bruce J. seems to have taken the view that if

(1) [1895] P. 170.

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"Europe" was meant—as geographically it does—to include the United Kingdom, then it would have been unnecessary to have had sub-s. 1 at all. I do not feel that quite so strongly, because vessels might be going from one port to another in the United Kingdom; but it does seem to me a strong argument to point out that after the words "north and east of Brest" come the words "or Channel Islands or Isle of Man." The Channel Islands are just as much part of Europe, geographically, as is the greater island of England and Scotland; and the Channel Islands are, undoubtedly, north and east of Brest. I think, therefore, that "Europe" must be limited, as Bruce J. limited it, to the Continent of Europe, and that a ship trading from London to Cardiff, or Ipswich to Leith, cannot be considered to be trading to a port north and east of Brest.

I, therefore, hold that the *Glanystwyth* did not come within the exemptions in either of these sub-sections, and that pilotage was compulsory. The result is that, in accordance with the agreement, the Court being of opinion that the defendants' contention is right, judgment will be entered for the owners of the ketch for one moiety of their damages, to be assessed by the registrar and merchants, but without costs.

Solicitors for plaintiffs: *Marshall & Haslip, for Cobbold, Sons & Co., Ipswich.*

Solicitors for defendants: *Thomas Cooper & Co.*

T. L. M.

[IN THE COURT OF APPEAL.]

C. A.
1899
*Feb.* 15.

## THE MEDIANA.

*Admiralty—Collision—Damages—Loss of Use of Lightship—Hire of Substitute.*

The plaintiffs, the Mersey Docks and Harbour Board, are by statute charged with the duty of lighting the approaches to the river Mersey, and, as there are four stations to be lighted, they own six lightships, four always in use, a fifth to replace the lightships as they are brought in, one at a time, for overhaul, and a sixth kept moored in the river Mersey in readiness for special emergencies to take the place of any one of the lightships which may be damaged.

One of the lightships was damaged by collision with a steamship owned by the defendants, who admitted liability, and, on the reference to assess the damages, all the out-of-pocket expenses were agreed to, consisting of the cost of raising and repairing the lightship and of supplying her place, together with the claims of the master and crew for their clothing and effects; but, on appeal to the Admiralty Division from the Liverpool District Registrar, a claim of 310*l.* 16*s.* for seventy-four days' loss of the use of the lightship, or hire of the services of the substituted lightship, was disallowed:—

*Held*, by the Court of Appeal (A. L. Smith and Collins L.JJ.), reversing the decision of Phillimore J., that the plaintiffs were entitled to substantial damages for the loss of the use of the lightship; and, therefore, the claim must be allowed.

*The Greta Holme*, [1897] A. C. 596, held applicable and followed.

Appeal by plaintiffs, the owners of the lightship *Comet*, against a decision of Phillimore J. disallowing a claim of 310*l.* 16*s.* for the loss of the use of the lightship damaged by collision with the steamship *Mediana* owned by the defendants.

The plaintiffs, the Mersey Docks and Harbour Board, are by statute charged with the duty of lighting the approaches to the river Mersey. There are four stations to be lighted, and, for the purpose of carrying out the work, the Mersey Docks and Harbour Board own six lightships, four of which are always in use, and a fifth (the *Prince*) is kept to replace the lightships as they are brought in, one at a time, for overhaul. A sixth (the *Orion*) lies moored in the Mersey ready to take the place of any one of the four lightships in case of special emergency, such as damage by collision or other accident.

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On April 23, 1898, the steamship *Mediana*, belonging to the defendants, came into collision with, and sank, the *Comet*, one of the lightships owned by the Mersey Docks and Harbour Board. After the collision the *Orion* was towed out to take the place of the sunken lightship, and was so engaged for seventy-four days, during which period she was not required for any other purpose.

The defendants admitted liability, subject to a reference to the Liverpool District Registrar to assess the amount of the damages.

The Mersey Docks and Harbour Board, as owners, and the master and crew of the *Comet*, filed a claim which, as assessed by the registrar, amounted to 2586*l.* 3*s.* 1*d.*, and consisted of eight items, the first seven covering all the actual out-of-pocket expenses to which the dock board were put, namely, cost of raising and beaching the *Comet*, 509*l.* 6*s.* 4*d.*; cost of removing the *Comet* to graving dock, repairs to boiler machinery, &c., dock rates and rent, 188*l.* 7*s.* 6*d.* Expenses of supplying place of the *Comet* on the station, 35*l.* 1*s.* 9*d.*; cost of repairing and replenishing the *Comet*, 1280*l.* 2*s.* 4*d.* Expenses incidental to casualty, 103*l.* 7*s.* 6*d.* Uniform, clothing, &c., lost, 19*l.* 1*s.* 8*d.* Claim by officers and seamen, 140*l.*

Item 8 was as follows:—

Loss of the use of the lightship *Comet*, or hire of the services of the lightship *Orion*, on the station from April 23, 1898, to July 6, 1898—seventy-four days at 4*l.* 4*s.*—310*l.* 16*s.*

The expense to the dock board of maintaining the sixth lightship, including interest on capital invested in her, amounts to about 1000*l.* per annum. During the last twenty-five years there have been twenty-three cases of damage by collision, in eleven of which it had been necessary to replace the lightship by the one kept in readiness in the river, and during the same period there had been four cases in which it had been necessary to withdraw one of the lightships in consequence of damage, occasioned by heavy weather and not by collision.

The defendants agreed to the first seven items, and also agreed that the amount of item No. 8, if chargeable to them, was reasonable, but they disputed their liability for that item,

alleging that, according to the law laid down by the Judicial Committee in *The City of Peking* (1), the plaintiffs could not recover anything under that head as they had not sustained any loss.

The learned registrar allowed the item, being of opinion that "although the facts in this case are not identical with those in *The Greta Holme* (2), the grounds on which that case was decided apply to the present claim."

The defendants, the owners of the *Mediana*, appealed from the finding of the registrar, and on January 27, 1899, Phillimore J., sitting in Admiralty, disallowed the claim, on the ground that the present case was concluded by authority binding upon him, and with which he agreed, namely, the cases of *The Clarence* (3), *The Munster* (4), and *The*

(1) (1890) 15 App. Cas. 438.

(2) [1897] A. C. 596.

(3) (1850) 3 Wm. Rob. 283.

(4) (1896. February 7.) Not reported. The *Munster* was one of a fleet of five steamers employed by the City of Dublin Packet Company in conveying mails and passengers between Holyhead and Kingstown under a contract with Her Majesty's Postmaster-General, by which the company, in consideration of an annual subsidy of 84,000*l*., carried the mails twice daily in each direction. For that purpose they were bound to provide, keep seaworthy, in complete repair and readiness, four good, substantial and efficient steam vessels. The voyages were to be performed in a stated time, and the company were liable to heavy penalties for breach of the contract. At the date of the contract the City of Dublin Company had four steamers only, each of which was required every year to have a complete survey by the Board of Trade, and had to be withdrawn from the service for that purpose. In order, therefore, to enable four steamers to be always kept in readiness, the City of Dublin Company built a fifth steamer (the *Ireland*) at a cost of about 100,000*l*. The annual survey of each steamer was taken advantage of to have a complete overhaul, and very large sums were expended by the City of Dublin Company on repairs, and in keeping the boats in the best possible condition. The annual survey and overhaul usually occupied a period of from six to eight weeks; and, therefore, during the greater portion of the year the City of Dublin Company had four boats on the station and one under survey. Only two boats were actually engaged in carrying the mails at the same time, and it was the custom of the company to work the four available boats in turn, each one doing about one week's mail service and then becoming one of the reserve boats. At the time of the collision, between the *River Avon* and the *Munster*, the *Ireland* was under survey, but she was hurried on and was shortly able to go on the station. The *Munster* was not available for the service between the date of the collision, December 21, 1894, and June 24, 1895, when her repairs were completed,

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*Emerald* (1), which, in the opinion of the learned judge, indicated the principle governing this case, namely, that where one

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and during this period the other four boats performed the mail and passenger service without accident and without any penalties being incurred under the Post Office contract. To enable this to be done one of the other boats (the *Connaught*) could not have her annual survey and overhaul, but the Board of Trade granted her a certificate for the next twelve months, after merely inspecting her. The survey and overhaul of another of the boats had to be postponed for some weeks.

It was not contended by the City of Dublin Company that they had been deprived of any profits by reason of the collision, or that they had been prevented from fulfilling any of the terms of their mail contract; but it was urged on their behalf that it was inequitable that the owners of the *River Avon* should be enabled to take advantage of the fact that the City of Dublin Company had expended a sum of 100,000*l.* in providing a spare boat to escape the payment of any demurrage.

Sir F. H. Jeune P. disallowed the claim for the loss of the services of the *Munster* during the time she was under repair, on the ground that her position was filled by the *Ireland* first, or other vessels afterwards, without any additional expense to the owners, the result of the collision being merely to bring the spare boat into use.

(1) Reported [1896] P. 192 on another point. In that action the steamship *Emerald*, belonging to the defendants, on May 6, 1895, ran into the lightship *Comet*, belonging to the plaintiffs, the Mersey Docks and Harbour Board, and, as the *Comet* sank the next morning, the board had to place another lightship, the *Orion*, on her station. In affirming the report of the registrar as to damages, and upholding the disallowance of the claim for the loss of the use of the lightship, Sir F. H. Jeune P. in the course of his judgment (March 4, 1896) said: "A charge has been made for the employment of the *Orion* in place of the *Comet* apart from the special expenses of that vessel. It is not a large sum, but it appears to me to be governed by the decision which I gave the other day in the case of *The Munster*, ante, p. 129, note (4), and in that case what appeared to me to be the governing principle was exactly that which was decided in the case of *The City of Peking*, 15 App. Cas. 438. In the case of *The Munster*, ante, p. 129, note (4), the circumstances were no doubt peculiar and raised the question in a neat form. There, there was a vessel which was kept in reserve, and the exigencies of the contract made by the City of Dublin Packet Company with the Government required that they should keep a vessel doing nothing but being ready, not specially for any chances of collision, but for any special matter which might arise, so that they had their vessel idle. Then, owing to a collision, they employed that vessel when she would not otherwise have been employed; and I thought the case was exactly the same as the case of *The City of Peking*, 15 App. Cas. 438, where, owing to the owners having a considerable number of vessels, they were so able to readjust their work amongst the vessels that they suffered no pecuniary loss. In the one case,

r more vessels are kept in reserve against the risk of the vessel in actual use being damaged through maritime contingencies, and it is possible to bring the reserve vessel into use, no charge can be made against the wrongdoer for the loss of the use of the vessel, as the plaintiffs suffer no real loss by reason of the temporary deprivation; and, therefore, where, as here, the wrongful act of the defendants only caused the damaged lightship to be in dock at one time rather than another without detriment to the plaintiffs, and the plaintiffs had a substitute ready to take her place, they were bound to do what was reasonable, and make use of the substitute so as not to increase the damages. The learned judge further held that the present case was not covered by *The Greta Holme* (1), as only three points were there decided, namely, that a claim for the deprivation, by the tortious act of the defendant, of the use of a chattel which the plaintiff was at the time actually using, is a primâ facie claim for some compensation in respect of the loss of its use; secondly, that the claim is not defeated because it cannot be carried out into actual money figures; and, thirdly, that a public body, discharging public duties, using the chattel, which it has bought or hired at the expense of the ratepayers, is not barred from claiming in respect of the loss of the use of the chattel—that is to say, a public body, making no profit, may make exactly the same claim as a private individual.

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owing to the exigencies of the requirements of their services, the company was obliged to have more ships than it strictly needed, and was able, so to speak, to fill up a gap by employing some of them in a somewhat different way to that in which they otherwise would have been employed. In the other case the company, by the exigencies of their business, had to keep a vessel in reserve, and were able, therefore, to utilize that vessel without any pecuniary loss to themselves. In neither case was any loss of profit shewn. Under these circumstances, it seemed to me that no charge could properly be made in respect of the services of the reserve vessel. Exactly in the same way here, it was necessary to keep a vessel in reserve, and it is always kept in reserve. It is kept in reserve not merely with a view to a collision happening, but in regard to the ordinary duties of the Mersey Docks and Harbour Board. It seems to me to fall exactly within the decision in *The Munster*, ante, p. 129, note (4), and no charge can be made for the reserve vessel's use, although charges can be made for any extra expenses incurred."

(1) [1897] A. C. 596.

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*Carver, Q.C.*, and *Aspinall, Q.C.* (*Maurice Hill* with them), for the appellants (plaintiffs). The Liverpool registrar found that, in accordance with the decision of the House of Lords in *The Greta Holme* (1), the Mersey Docks and Harbour Board were entitled to compensation for the loss of the use of their lightship, the *Comet*, during the seventy-four days she was under repair.

The learned judge in the Court below reversed this finding, on the ground that, as a plaintiff must mitigate, not aggravate, the damages, the board was bound to substitute the *Orion* for the *Comet*, and make no claim for the loss of the use of the *Comet*, or, alternatively, for the hire of the *Orion*; but it is submitted that if the board, in view of such accidents as collision, maintain, at a cost of 1000*l.* per annum, a vessel in reserve, the defendants, as tortfeasors, are not entitled to the benefit of the prudent act of the board in investing capital in the purchase of a lightship to be used by way of substitute in cases of emergency, and it seems clear that if a second wrongdoer ran down the reserve lightship, he would have to pay for the hire of the tug or other vessel substituted for the reserve; but if the judgment in the present case is right, the first tortfeasor is to escape. The measure of damage is the cost of maintaining the lightship.

[COLLINS L.J. Is that quite so? The point is that a jury need not be directed to give nominal, but might give substantial damages for the deprivation of the use and enjoyment of the chattel.]

The decisions shew that the cost can be looked at in cases where corporate bodies, in a similar position to the board, have provided plant by anticipation: *The Harrington.* (2)

No doubt the Admiralty Registrar, and judges sitting in Admiralty, have hitherto acted upon the principle that tangible pecuniary loss must be shewn: see the cases of *The Clarence* (3), *The Munster* (4), *The Emerald* (5), and *The Rutland* (6); but the House of Lords has now laid down that

(1) [1897] A. C. 596.
(2) (1888) 13 P. D. 48.
(3) 3 Wm. Rob. 283.
(4) Ante, p. 129, note (4).
(5) Ante, p. 130, note (1).
(6) [1896] P. at p. 195, n. (2).

actual pecuniary loss is not necessary to entitle a plaintiff to compensation for the deprivation of the use of a chattel. In *The Greta Holme* (1) the Lord Chancellor (2) denies that there is any authority for the principle that before a plaintiff can recover it must be shewn that "some specific money has been lost by the period of time during which the article has not been susceptible of being used." Lord Herschell (3) adds that it makes no difference that the plaintiffs are trustees, not carrying on their undertaking for profit, and explains *The Rutland*. (4)

The defendants as wrongdoers are not entitled to claim, by way of reduction of damages, the benefit of what is, in effect, an insurance by the board against accident: *Bradburn* v. *Great Western Ry. Co.* (5)

*Pyke, Q.C.*, *Horridge*, and *Stuart Moore*, for the respondents (defendants), the owners of the *Mediana*. The report of the learned registrar admits that it could not have been contended successfully that, on a reference as to damages, the plaintiffs could, prior to the decision in *The Greta Holme* (1), have recovered anything under such a claim as the present, and no attempt was made to appeal on this point in the case of *The Emerald* (6), where exactly the same facts occurred, for the *Emerald* came into collision with the *Comet*, and the place of the lightship was taken by the *Orion*; but the registrar and merchants disallowed the claim of the plaintiffs to compensation for the loss of the use of the *Comet*, and that decision was upheld by Sir F. H. Jeune P.

The *Orion* is kept to supply the place of one of the lightships for all casualties other than the periodical overhaul, and, in maintaining that vessel in reserve, the plaintiffs are only carrying out the principle incumbent upon all persons in a similar position, for a man must always do that which is reasonable to prevent the damages being excessive, and if the person injured has something at hand to take the place of the thing of which he is deprived, he is bound, if he can, to make use of it, so as not to inflame the damages.

(1) [1897] A. C. 596.
(2) [1897] A. C. at p. 602.
(3) [1897] A. C. at p. 605.
(4) [1896] P. at p. 195, n. (2).
(5) (1874) L. R. 10 Ex. 1.
(6) Ante, p. 130, note (1).

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*The Greta Holme* (1) is distinguishable. The ground upon which that case was successfully argued in the House of Lords was that the board had no stand-by, and that there were no dredgers to be hired to take the place of the one damaged, so that the work of deepening the river was delayed. The Lord Chancellor says (2) that the operations of the board "in reducing the silting up were delayed," and that the deprivation of the use of part of the machinery of the board gave a right to damages because it "delays or impairs the progress of their works." Lord Watson states (3) as one of the facts in the case that, owing to the absence of the dredger, "the bottom of the channel stood at a higher level than it had occupied at the commencement," and (4) that "there was a deposit of silt which would not otherwise have accumulated." That case, therefore, does not cover a case like the present, where, as part of the proper mode of conducting their business, the plaintiffs have a stand-by, and are at no expense; for the *Orion* was towed up at once in place of the *Comet*, and no break occurred in the lighting of the Mersey. The attempt by Lord Herschell (5) to explain away *The Rutland* (6) is not successful, and the primâ facie case which the plaintiffs have made is displaced by the defendants proving that no loss was in fact sustained.

A. L. SMITH L.J. The substantial question in this case is whether it comes within the principle laid down in *The Greta Holme* (1) in the House of Lords.

If this case had come before us when *The Greta Holme* (1) was in this Court, I should have thought that the decision now under appeal was right. I thought then that the older cases lead to the conclusion to which we came, namely, that as the harbour board had not suffered actual pecuniary loss by reason of the loss of the use of their dredger, they could not recover damages for such loss from the tortfeasor. The difference between *The Greta Holme* (1) and this case is that the *Greta Holme* had run down a dredger, which had to perform dredging

(1) [1897] A. C. 596.
(2) [1897] A. C. at p. 602.
(3) [1897] A. C. at p. 598.
(4) [1897] A. C. at p. 604.
(5) [1897] A. C. at p. 605.
(6) [1896] P. at p. 195, n. (2).

operations, and those operations were delayed, whereas in the present case a lightship has been run down by the *Mediana*.

I think that Phillimore J., with full knowledge of the numerous cases decided upon this point, based his judgment upon the old authorities, and came to the conclusion that *The Greta Holme* (1) did not apply. I cannot come to that conclusion. The Mersey Docks and Harbour Board are bound by law to light the Port of Liverpool, and their practice is this. They have four lightships always on their stations; they have a fifth lightship, for the purpose of putting it into the place of any one of the four, if repairs are wanted thereto; and they have a sixth lightship to supply the place of any lightship which, as in the present case, has been run down and sunk by a tortfeasor. In the excellent report of the Liverpool District Registrar, I find that this sixth lightship costs the plaintiffs about 1000*l.* a year. Now, what happened? The lightship *Comet* was at its post, lighting the Mersey. The tortfeasor came in and sank it, and for seventy-four days the harbour board were deprived of her use. In the meantime the sixth lightship, which is kept at an expense of 1000*l.* a year, was sent out to take her place, and go on lighting the Mersey during those seventy-four days. No question arises as to the injury done to the *Comet* herself, for that has been paid for, but the tortfeasor denies that he is bound to pay anything for the seventy-four days during which the board was deprived of the use of the *Comet* by his wrongful act, and for the use of the sixth lightship in her place. The question is whether the harbour board are entitled to get from the tortfeasor, not merely nominal, but substantial, damages. No question of amount arises, for that has been agreed at the sum of 310*l.* 16*s.*

Now, before the case of *The Greta Holme* (1) was decided in the House of Lords, we held, on the authority of previous cases, that only nominal damages were recoverable, in circumstances such as the present, because the harbour board had lost nothing actually out of pocket; but the House of Lords said that what the board had to pay out of pocket was not

(1) [1897] A. C. 596.

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the measure of damages, for damages could be given against a tortfeasor by reason of the board being deprived of the use of the dredger. In the case of *The Greta Holme* (1) it was the loss of the use of a dredger that was complained of, and I do not lose sight of the fact that in *The Greta Holme* (1) it was alleged that there was some loss of dredging during the time the dredger was in dock repairing; but I cannot read the judgments in that case as shewing that the decision of the House of Lords was founded upon the loss of dredging. It is true that the Lord Chancellor in delivering his judgment refers to it, but he says that this Court was wrong in holding that in order to succeed there must be proof of actual money lost by the harbour board. Lord Watson does not base his judgment upon the question of dredging at all. What he says is that "the loss to the appellants of the services of the dredger for a period exceeding a quarter of a year was the natural, necessary and direct result of her collision with the *Greta Holme*, to whose fault the collision was solely attributable, and in my opinion there is no maritime or other rule which protects the owners of the offending ship against (substantial not merely nominal) damages attendant upon results of that kind."

Then Lord Herschell says that he takes it to be clear law that a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages, even though he cannot prove that he is a definite sum of money out of pocket; and then he deals with the case of *The Rutland*. (2) That was a case in which Sir James Hannen disallowed a claim for the loss of the use of a dredger by collision. That is exactly what we did in *The Greta Holme* (1), and we followed that case. When *The Greta Holme* (1) went to the House of Lords, Lord Herschell had before him the judgment of Sir James Hannen, and referring to it the noble and learned Lord says that he is not satisfied that Sir James Hannen intended to lay down any such proposition as that you cannot get substantial damages against a tortfeasor for deprivation of the use of his chattel. In my opinion, the words of Lord Herschell are directly against what

(1) [1897] A. C. 596. (2) [1896] P. 195, n. (2).

was said and held by Sir James Hannen in the case of *The Rutland* (1), which in my opinion is no longer law.

Now, with regard to the effect of the harbour board having purchased and kept the sixth lightship as they did as a stand-by. If they had not purchased that ship they would, I suppose, under their statutory obligation, have had to find one somewhere or other, because they were bound to light the Mersey. Instead of going into the market as occasion required, they invest their capital and buy a ship, and go to the expense of maintaining it, in order to fill the place of a ship which may happen to be run down. They invest their money, and stand for the purpose their own insurers as regards the sixth lightship. The tortfeasor runs down a lightship and is sued for damages. What right has he to say, "You stood your own insurers with regard to the sixth lightship, and although this cost you money, you must use that ship for my benefit in mitigating the damages which I should otherwise have to pay for my misfeasance"? This cannot be.

I agree with that part of the judgment now under appeal, that a person injured must ordinarily mitigate damages if he can reasonably do so; but when a tortfeasor has run down a ship and the injured party has invested his capital in another ship to take the place of the one run down, that tortfeasor, when he is sued for damages, is not entitled to say, "You must use in ease of me the ship you have kept in reserve at your own cost in case of need." That is not the law. The principle is clear. Where a man insures himself against, say, a railway accident, and is injured by the negligence of a railway company, the railway company, when called upon to pay damages, cannot say, "You have got an insurance ticket in your pocket and you will get 1000*l.*; you must allocate that sum towards the damages I should otherwise have to pay"; yet that is what is being attempted to be done in this case, in respect of this sixth lightship. I am of opinion that this case comes within the principle laid down in *The Greta Holme* (2), and the appeal must be allowed.

(1) [1896] P. 195, n. (2). (2) [1897] A. C. 596.

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COLLINS L.J. I am of the same opinion, and I think that the learned registrar deals with the point so satisfactorily that it would not be necessary for me to add anything to the exhaustive judgment of A. L. Smith L.J., in which I entirely concur, were it not that we are differing from the decision of Phillimore J.

I take the decision in the case of *The Greta Holme* (1) to be this—that the deprivation of a chattel by a wrongdoer is of itself a ground of damages to the owner, irrespective of the special use to which the chattel might have been applied, and for which there might also be special damages. The two may co-exist, and in the case of *The Greta Holme* (1) they did. It is said that in the present case they do not, but I am not sure about that. If, however, they do not, still the deprivation of the chattel would, in my opinion, ground a claim for damages.

In *The Greta Holme* (1) Lord Herschell takes the case, not of the actual dredger, but of a stand-by, and, assuming it to be hired, asks whether it could be said that if the board were deprived of the use of the subject-matter for which during that time they were compelled to pay hire, a substantial sum could not be recovered. Then he says, substitute for that the actual dredger. Why is the board to be deprived of the use of what represents capital during that time? Hiring is only one method of proving it; interest on capital is another.

Lord Halsbury says it is no answer to the claim to allege that the person would not have made money out of the chattel taken away if it had been left in his possession, and he then goes on to deal with the fact that had they had it they would have performed a public service with it. In the present case a public service would have been equally performed, though in a different form. One is just as much a public benefit as the other, and in neither case is there pecuniary loss. The loss which the owners have sustained stands on exactly the same principle in either case. They are deprived of an instrument by which they were doing a public benefit.

Lord Watson shews that the deprivation of the chattel itself

(1) [1897] A. C. 596.

is the subject-matter of damages, and adds: "I am of opinion upon the whole matter that the appellants have succeeded in proving substantial and not merely nominal damages; and that opinion is not weakened by the fact that, owing to the absence of the dredger, there was a deposit of silt which would not otherwise have accumulated, and which required to be removed after her return to duty." In that case there was no stand-by. In the present case there was a stand-by, but the consequences would be serious if the fact that the board had a stand-by deprived them of damages as decided in the Court below. It would mean that, apart from special damage, the damages to the rich man must be different from the damages to the poor man, if you are to assess them differently where a man has many of some particular kind of chattel, and where he has only one. Why is a millionaire from whom a picture is taken away to recover a smaller sum of money for the loss of that particular chattel, during a particular time, than A., B., and C., who have no claim to be millionaires? There is no principle involved: it is merely a matter of prejudice.

It seems to me that, accepting, as I am bound to do, the decision in the House of Lords, this case is too clear for argument. When *The Greta Holme* (1) was in this Court, things were entirely different. There was a long line of authorities before this Court, and judgment was given in accordance with those authorities; but now every authority, including *The Rutland* (2), if it is not distinguishable, conflicting with the case of *The Greta Holme* (1) is, in my opinion, overruled.

*Appeal allowed.*

Solicitors for appellants (plaintiffs): *Rowcliffes, Rawle & Co., for A. T. Squarey, Liverpool.*

Solicitors for respondents (defendants): *Hill, Dickinson, Dickinson & Hill, Liverpool.*

(1) [1897] A. C. 596. (2) [1896] P. 195, n. (2).

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*Feb.* 22, 23;
*March* 11.

[IN THE COURT OF APPEAL.]

## THE VORTIGERN.

*Admiralty—Ship—Charterparty—Voyage of Steam-vessel in Stages—Insufficiency of Coal—Cargo Burned as Fuel—Warranty of Seaworthiness.*

The plaintiffs' steam-vessel left Cebu in the Philippine Islands for Liverpool with cargo belonging to the defendants, shipped under a charterparty and bill of lading giving liberty to coal at ports on the way, and excepting the negligence of the master and engineer. The vessel called at Colombo, but did not take in a reasonably sufficient quantity of coal for the next stage to Suez, and, when passing Perim (a coaling station), the master did not call there owing to the negligence of the engineer in not informing him that the coal was running short. In consequence, whilst proceeding up the Red Sea, 50 tons of cargo were burned as fuel in order to carry the vessel on to Suez where she again coaled, and so was enabled to perform the chartered voyage to Liverpool. In an action for balance of freight:—

*Held*, by the Court of Appeal (Lord Russell of Killowen C.J., A. L. Smith and Collins L.JJ.), affirming the decision of Gorell Barnes J., that the defendants were entitled to set off by way of counter-claim the value of the cargo burned against the freight, on the ground that, if the plaintiff shipowners, owing to the necessity for coaling, availed themselves of the liberty to call at ports on the way, they must make their vessel seaworthy at the commencement of each stage for the voyage or stage of the voyage she then enters upon, and, in the circumstances of this case, the second stage was from Colombo to Suez. The plaintiffs, therefore, could not rely on the exception covering negligence of the engineer when off Perim, as by the insufficiency of coal when the vessel left Colombo the implied warranty of seaworthiness had been broken.

*Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*, (1870) L. R. 3 P. C. 234, and *Thin* v. *Richards*, [1892] 2 Q. B. 141, followed.

Appeal by plaintiffs, E. P. Babtie and others, owners of the steamship *Vortigern*, in an action for balance of freight against a decision of Gorell Barnes J. in favour of the counter-claim of the defendants, Joseph Samuel & Son, owners of cargo burned as fuel.

The material facts were shortly as follows:—

By charterparty dated London, August 6, 1897, made between the owners of the *Vortigern*, and the defendants, as agents for the Campania General de Tabacos de Filipinas, it was agreed

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that the vessel should load at Manila or Cebu, from the agents of the charterers, a full and complete cargo of lawful Philippine produce, and (with liberty to call at any ports in any order) therewith proceed to and, on payment of a lump sum freight of 3875*l.*, deliver the same at Liverpool, dangers of navigation or machinery, negligence, default or error in judgment of the owners, pilot, master and crew or other servants of the ship-owners excepted.

Under a bill of lading, signed by the master of the *Vortigern*, and dated at Manila, September 30, 1897, the Campania General de Tabacos de Filipinas shipped in good order and condition at Manila 500 tons copra in bags for delivery in the like good order and condition, unto order or assigns at Liverpool, on payment of thirty shillings freight per ton delivered, the vessel "having liberty to call at any port or ports in or out of the customary route in any order to receive and discharge coals," and "loss or damage by machinery boilers or steam, however caused, or from . . . . error in judgment, negligence or default of . . . . master, mariners, engineers, or other persons in the service of the (plaintiffs), whether in navigating the ship or otherwise . . . . being excepted . . . . and the ship not being liable for any consequences of causes herein excepted, however originating."

From the evidence it appeared that the *Vortigern* steams about 9 knots per hour on a consumption of about 18 tons per day of ordinary Welsh coal. She left Manila on October 14, 1897, with 155 tons of coal in her bunkers, and took in 20 tons at Cebu, from whence she started on her chartered voyage. On October 27 she arrived at Labuan with 3 tons remaining, and on October 29 left that port with 470 tons of Labuan coal. On November 12 she reached Colombo having 138 tons of Labuan coal left, and the engineer then discovered that he had been burning over 25 tons per day, being over 3 tons in excess of his calculation of 22 tons per day. At Colombo the vessel filled up with 300 tons Indian coal, and left on November 13 for Port Said, having altogether 438 tons of coal on board. The weather was fine, and about midnight on November 24 the vessel was off Perim, which is a coaling station. The

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master then inquired of the engineer as to the quantity of coal, and was informed that there were over 200 tons. This was more than sufficient to take the vessel to Suez, 6 days' steaming, or even to get through the canal to Port Said, 19 hours further. He, therefore, did not put into Perim, but continued his voyage. On November 29 it was discovered that instead of 85 tons, which there should have been, there were only about 40 tons left in the bunkers. Some 50 tons of the cargo of copra were then mixed with the coal and consumed as fuel so as to enable the vessel to reach Suez, the nearest port where coals could be obtained. The contents of the last sack of coal brought them to Suez on the morning of December 1, where, and at Port Said, Welsh and North Country coal was obtained with which the vessel completed her chartered voyage to Liverpool.

It was alleged by the plaintiffs that, after leaving Colombo, owing to a waste of steam, arising from the high-pressure valve-gear working heavily, the consumption increased to upwards of 26 tons per day, and that the insufficiency of coal was due to this cause; but the evidence shewed that the consumption of Labuan and Indian coal is practically the same, or about 7 tons per day in excess of Welsh coal; so that assuming, in favour of the shipowner, that the stage was from Colombo—not to Port Said but—to Suez, the distance to be run was 3451 miles, which at the average speed made by the vessel of $7\frac{3}{4}$ knots would take about $18\frac{1}{2}$ days, and it was calculated by the expert witnesses called that, allowing 3 or 4 days as a fair margin for contingencies, the proper quantity of coal for the stage would not have been less than 574 tons. Irrespective, therefore, of any question of breakdown of machinery, the quantity of coal was insufficient for the stage.

On delivery of the cargo of copra 828 bags short, the defendants paid 3264*l.* 1*s.* 8*d.* freight, and the plaintiffs commenced this action for the balance—610*l.* 18*s.* 4*d.* The defendants admitting liability, paid 20*l.* 5*s.* 7*d.* into court, and as to the balance claimed to set off 590*l.* 12*s.* 9*d.*, being the value of the copra burned as fuel and which the defendants alleged was lost owing to the unseaworthiness of the *Vortigern* through her

being "insufficiently supplied with coal for the voyage or alternatively for the voyage from Colombo or alternatively from Perim," and the copra was "burnt and lost owing to the negligence of the plaintiffs and their agents in failing to procure a supply of coal sufficient for the voyages mentioned." The defendants further counter-claimed for the repayment of 559*l.* deposit made in respect of general average to obtain delivery of the cargo.

The plaintiffs, by their amended reply and defence to the counter-claim, after denying that the *Vortigern* was unseaworthy when she left Colombo, or Perim, or at all, alleged that she "had an ample supply of coal on leaving her several ports of loading, and on leaving Colombo, but by reason of the negligence of the engineer no further or no sufficient supply was thereafter taken at Perim which was necessitated by a breakdown of the engines," and after setting out the exceptions above mentioned in the charterparty and bill of lading the plaintiffs alleged that "the negligence $\frac{\text{and}}{\text{or}}$ default $\frac{\text{and}}{\text{or}}$ error of judgment of the plaintiffs' servants in not discovering that a breakdown of machinery had occurred after leaving Colombo necessitating and causing an increased consumption of coal and in the engineer not procuring a proper supply of coal at Perim is covered by the exceptions contained in the charterparty and bill of lading, and the plaintiffs say that they are thereby relieved from all liability in respect of the said neglect default and error of judgment," and further that "the burning of the said cargo under the circumstances aforesaid constituted a general average act, and the plaintiffs were entitled to demand a contribution or deposit in respect thereof."

The case was tried on May 26, 27, 1898, by Gorell Barnes J., when the defendants' counter-claim was pronounced for, and the plaintiffs condemned in the sum of 538*l.* 14*s.* 5*d.*, which with 20*l.* 5*s.* 7*d.* paid into court by the defendants and ordered to be repaid out to them, made the sum of 559*l.* deposited by them in respect of alleged general average.

In the course of his judgment the learned judge said:—

The dispute in this case is whether the plaintiffs are responsible to the defendants for the loss of the portion of the

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cargo burnt; and that turns upon two questions—one of fact and the other of law.

The question of fact is whether this ship—which loaded the goods in question at Cebu, and, in the course of her voyage to Liverpool, called at Colombo, and there coaled, with the intention of proceeding from Colombo to Port Said, and recoaling again at Port Said—was seaworthy or not when she left Colombo?

The question of law is—assuming that she had not enough coal to carry her from Colombo to Port Said—whether there was a breach of contract in relation to unseaworthiness, because in the course of that voyage she would pass the coaling port of Perim, where she could put in, having coal enough to take her from Colombo to Perim?

First of all I have to determine the question of fact. Had this ship enough coal to carry her from Colombo to Port Said, and was the loss due to any deficiency in that respect?

The case has not been contested by the defendants upon the strict footing of a voyage from Colombo to Port Said. It has been practically treated as a voyage shorter than that—namely, from Colombo to Suez—I suppose nearly a day less by the length of the Canal—and that is an advantage in considering the case for the plaintiffs. But, taking the facts as they are now proved by the evidence of the engineer and others, the conclusion to which I have come is that, at the time when this vessel started from Colombo for Suez, she was unseaworthy for that transit in that she had not sufficient coal—a reasonably sufficient supply of coal—for the purpose of making that voyage, or stage of the voyage, and that the loss of the cargo which was burnt to make up the shortage of coal was due to that unseaworthiness.

It seems to me that the real explanation of this case is to be found in the fact that the coal which was put on board was coal of which a larger quantity per day was consumed than would have been the case if it had been Welsh coal or other coal supplied in this country.

We are told that the coal which she had on board when she started from Colombo was partly Labuan coal—Labuan being

one of the ports at which she called—and partly Indian coal, and Mr. Bushell, who was called by the defendants and gave his evidence with clearness and accuracy, stated that a considerable quantity more of Labuan coal is required per day for such a vessel than of Welsh coal; and I think that the engineer—judging from his log-book—had underestimated the consumption of that coal before he got to Colombo. It is said that the Indian coal taken at Colombo would be about the same in consumption as the Labuan coal, and I think, therefore, that they did not take enough coal at the port of Colombo, having regard to what the ship had been doing, and that they ought to have taken more. The actual quantity taken when she left Colombo was, according to the log-book, 438 tons altogether. Nothing eventful appears to have taken place on the voyage—I shall deal with the question of the breakdown later on—it was an ordinary favourable voyage, and yet the vessel is found, before she reaches Suez—which is a day short of Port Said—so much short of coal that she has to burn fifty tons of cargo to make it up. Those facts alone, I should have thought, would have shewn that she was short of coal in fact, and therefore unseaworthy when she started. But the analysis of the log-book shews that she was very largely short of coal, because when the consumption and speed are calculated I see no reason to doubt the accuracy of the evidence given by Mr. Bushell that if this vessel had allowed no margin at all she would have required about 474 tons of coal, which substantially fits with what she did burn, because she burnt 438 tons plus the cargo which has been destroyed, and arrived I suppose with practically nothing at Suez. But it is not right to take exactly what will carry the ship to a port of destination. A reasonable margin must be allowed for the ordinary incidents of the voyage. Mr. Bushell estimates that four days' consumption, and the next witness called, Mr. Nowell, says three or four days, is the proper and reasonable allowance for an eighteen days' trip. If that is added there is a necessary requirement of some 574 tons for this ship. But even taking the view presented on the part of the plaintiffs that two days is enough, yet that means a requirement of some 524 tons to make her seaworthy for the

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trip. Even if the other figures which have been dealt with are gone into, namely, the amount of coal found to be consumed by November 29, and any estimate based upon that as to how much she was consuming, and even only two days are allowed as a margin, that gives the amount of 506 tons, and very much the same figures are arrived at if the estimate of her consumption is taken up to November 25. That day was taken because that was the first day upon which there was any record that the ship was steaming badly.

The point made is that if the consumption is taken up to that date, with an allowance of only two days' margin, the vessel would still be far short of the proper amount of coal required to take her to her destination.

I now come to the other point of fact which has to be considered, namely, the suggested breakdown. There seems no doubt that at some period of the voyage a ring in the high-pressure slide-valve had become broken. When that was done has not been established; but resting upon the evidence which has been given, I see no reason to attribute to that cause any delay in the ship's arrival at Suez or Port Said, or in the increased consumption of coal.

Upon the question of fact I, therefore, hold that this ship was not seaworthy at the time she left Colombo for the voyage from there to Suez—I ought to say Port Said, but I say from what has taken place in the case to Suez—and that the loss of the cargo burnt was due to the vessel when she left not being seaworthy.

Then comes the second point, the point of law. If there were no coaling port to call at between Colombo and Suez there would be an end of the matter—the vessel would be unseaworthy, and, the loss happening in the way it does, there would be no further point to take; but the plaintiffs say that the warranty of seaworthiness has not been broken, because there were two coaling ports, Aden and Perim, but especially Perim, which the vessel passed close to and at which a fresh supply of coal could have been taken, that she had ample coal up to Perim, and that the omission to take coal again at Perim was a negligent act of those in charge within the exceptions

mentioned in the bill of lading and the charterparty. That is the point they take. My opinion is that the view expressed by Lord Esher M.R., Fry and Lopes L.JJ., in the case of *Thin* v. *Richards* (1), was that the warranty of seaworthiness in contracts of shipping, where there is liberty to call and coal at ports on the way, must either be complied with entirely at the outset, or, that if the voyage is broken up into distinct stages, as is usual in these long voyages nowadays, for the purpose of coaling, that then the vessel must be made seaworthy at the commencement of each stage of the voyage, and that the master has to determine when he starts from one port to another what is the stage which he intends to perform with the vessel, and the vessel must be supplied with sufficient coal when starting on each stage.

If that is so, and I think that is what is intended by these judgments, and what I think myself is right, it follows from what I have already said, that there was a breach of this warranty in this case, and that it is immaterial to consider what happened afterwards in passing Perim. But even if it be not a breach of the warranty for the vessel to start with insufficient coal to reach the next port at which it is intended that she should coal, provided there is another coaling port which she will pass on the way and can have as it were in reserve to go into if necessary, then it seems to me that the plaintiffs would be in this difficulty: that they must then treat the voyage as divided into two stages from Colombo to Port Said instead of one, and that the second stage, namely, from Perim to Port Said, was one on which it is clear that this vessel was not seaworthy when she started upon that stage, and, therefore, they cannot say that they have complied with the warranty of seaworthiness. The vessel must be seaworthy for the whole stage, or made seaworthy for each division of the stage, and she was not seaworthy for the portion of the voyage on which the loss occurred.

For myself I prefer to put it rather in the way I have first said. If the captain determines to start, as in this case, from Colombo to Suez, that is the stage which was fixed upon, and

(1) [1892] 2 Q. B. 141.

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if the vessel has not enough coal for that stage I do not think the owners are relieved from the obligation thus incurred by setting up negligence in not putting into a port on the way to get coal if they are found to fall short in the transit from Colombo to Suez.

For these reasons it appears to me that the defendants succeed, and it follows that the plaintiffs had no right to insist upon the deposit against general average, because there was no general average for which the defendants were responsible.

Feb. 22, 23. The plaintiffs appealed both on fact and law, but the arguments as to the alleged breakdown of the machinery are unnecessary for the purposes of this report, and, owing to the view taken by the Court of Appeal, the arguments as to contribution in general average are also omitted.

*Scrutton* and *D. Stephens*, for appellants (plaintiffs), the owners of the *Vortigern*. The distance between Cebu and Liverpool renders it commercially impossible to take sufficient coal for the whole voyage and, therefore, in accordance with the usual practice on these long voyages, the charterparty and bill of lading give liberty to call at coaling ports on the way, that is to say, the voyage is divided by necessity into stages, and no warranty is implied that at starting the vessel has sufficient coal for the entire contract voyage. It is admitted by the respondents that the vessel started on her chartered voyage from Cebu with sufficient coal to take her to Colombo, which was the first stage, but it is alleged, and found by the learned judge in the Court below, that the second stage was from Colombo to Suez, and that on this second stage the vessel had not sufficient coal to carry her to the end of that stage, and therefore that the warranty of seaworthiness was broken. It is, however, submitted that this is introducing into the contract of affreightment a new element, namely, an implied warranty subsequent to the commencement of the voyage. The warranty implied by law attached at the commencement of the adventure, namely, at Cebu, and was complied with by the vessel having sufficient coal to take her to the first coaling station, namely,

Colombo, for all that the shipowner undertakes in the case of a voyage divided, by necessity, into stages is that his ship shall, in the matter of coal, be seaworthy at the commencement of the voyage for the first stage. At each stage subsequent to the first, it becomes the duty of the master to supply the vessel with coal, and for negligence in this respect the shipowner is protected by the exception in the bill of lading.

Secondly, assuming that there is an implied warranty at the commencement of each stage, that warranty was not broken in this case, for admitting that the liberty to call is limited to such ports as are fairly within the specified voyage—*Glynn* v. *Margetson* (1)—then it is not disputed by the respondents that the vessel had sufficient coal to take her to Perim, which is a usual coaling station, and where the master would have coaled had it not been for the negligence of the engineer, which prevented him from supplying the vessel with the proper equipment in that respect. This did not render the vessel unseaworthy at Colombo, that is to say, the vessel had enough coal to take her to the nearest usual coaling port, and therefore it was in the power of the master to supply the deficiency in the course of the voyage. In *Hedley* v. *Pinkney & Sons* (2) the ship was held not to be unseaworthy because her master neglected to use a part of her equipment whereby the safety of the crew was endangered. In all these cases the question is whether the vessel is seaworthy at starting, and in *Steel* v. *State Line Steamship Co.* (3) the case had to be sent down for rehearing because that was the material question, and the jury had not found that the porthole was insufficiently fastened when the vessel left New York. The case of *Thin* v. *Richards* (4), which was relied upon in the Court below, is not in point, because the voyage there was short, and the doctrine of stages by necessity did not apply. Day J. there held that the warranty of seaworthiness was broken because the ship had not a sufficiency of coal for the entire voyage from Oran to Garston. On appeal, Lord Esher M.R. thought that if the case was one of stages, then it was governed by the principle

(1) [1893] A. C. 351.
(2) [1894] A. C. 222.
(3) (1877) 3 App. Cas. 72.
(4) [1892] 2 Q. B. 141.

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relating to insurance laid down in *Biccard* v. *Shepherd* (1), but doubted whether the voyage from Oran to Garston could be held to be divided into stages because the entire voyage was not a long one, and, therefore, the vessel might have been made seaworthy in the matter of coal at starting. Fry L.J. also assumes that the vessel could have carried enough coal for the entire voyage. But in the present case it is clear that the vessel could not possibly be made seaworthy in this respect, though she admittedly was seaworthy for the first stage, and being seaworthy at starting the implied warranty was satisfied, as the vessel need not continue so throughout the voyage: *Bermon* v. *Woodbridge*. (2) In *Walford de Baerdemaecker & Co.* v. *Galindez Brothers* (3) the vessel was held not unseaworthy though she had not coal enough to reach the quarantine port to which she was ordered by the authorities at Santos.

*Joseph Walton, Q.C.*, and *Mansfield* (*Horridge* with them), for the respondents (defendants). The cargo owners established in the Court below that the implied warranty of seaworthiness attaching at the commencement of the voyage had been broken as the vessel had not a sufficiency of coals under ordinary conditions for the contract voyage. To meet this primâ facie case against them on the issue of unseaworthiness the shipowners relied on the liberty to call at ports on the way—in other words, on stages by necessity for coaling purposes; but this concession to the shipowners involves the extension of the implied warranty of seaworthiness at the commencement of the voyage to the commencement of each stage: see in respect of a voyage policy of insurance, *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (4); and in respect of the contract of affreightment, the decision of this Court in *Thin* v. *Richards*. (5)

It was incumbent on the shipowners, therefore, to prove that they had on board at Colombo a sufficiency of coal for the second stage. The charterparty is silent as to what the stages were to be, but the learned judge in the Court below found that

(1) (1861) 14 Moo. P. C. 471.
(2) (1781) 2 Dougl. 781, at p. 788.
(3) (1897) 2 Com. Cas. 137.
(4) L. R. 3 P. C. 234.
(5) [1892] 2 Q. B. 141.

the second stage was from Colombo to Suez. The evidence of the shipowners broke down on this point, whilst the evidence of the defendants conclusively shewed that there was not a sufficiency of coal on board the vessel to take her from Colombo to Suez. The shipowners, therefore, could not rely upon the negligence clause to protect them in respect of the miscalculations of the engineer when off Perim, for this was subsequent to, and overridden by, the breach of the implied warranty of seaworthiness on the commencement of the second stage from Colombo.

*Scrutton*, in reply. *Thin* v. *Richards* (1) is the only case which applies this doctrine of insurance to an affreightment contract, and should not be extended to cases of stages by necessity. The question of the necessity of the stages—that is, the necessity of replenishing commodities which are consumed as the ship goes along—did not really arise there, for the voyage, being a short one, the ship might have satisfied the implied warranty of seaworthiness attaching at the commencement of the adventure by carrying coal enough for the entire contract voyage.

[Reference was made to the cases of *Dixon* v. *Sadler* (2), *Burges* v. *Wickham* (3), *Bouillon* v. *Lupton* (4), and to Arnould on Marine Insurance, 6th ed. pp. 648, 669.]

*Cur. adv. vult.*

March 11. LORD RUSSELL of KILLOWEN C.J. concurred in the following written judgment:—

A. L. SMITH L.J. This is an action by the owners of the steamship *Vortigern* to recover from the defendants the sum of 610*l.* 18*s.* 4*d.*, being for freight under a charterparty dated August 6, 1897. The defence is that a portion of the defendants' cargo, consisting of copra—a species of coconut—had during the voyage been burnt by the master as fuel for the ship; and that this burning of the cargo had taken place in consequence of the breach of the implied warranty of seaworthiness

(1) [1892] 2 Q. B. 141.
(2) (1839) 5 M. & W. 405, at p. 414.
(3) (1863) 3 B. & S. 669.
(4) (1863) 33 L. J. (C.P.) 37.

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which attached to the contract of affreightment at the commencement of the voyage—that is, that coal necessary for the due prosecution of the voyage had not been taken on board when the ship commenced the chartered voyage, and the cargo had, therefore, to be used as fuel in the place of coal.

This defence depends upon a point of law and a question of fact.

The value of the cargo burnt equalled the freight claimed, excepting as to 20*l.*, which was paid into court by the defendants. The charterparty was in the ordinary form, and was for a voyage by the plaintiffs' steamship from Cebu, in the Philippine Islands, to Liverpool, calling at Marseilles if ordered. By the charterparty the steamship had liberty to call at any ports in any order, and by the charterparty dangers of navigation or machinery, negligence, default or error in judgment of the owners, pilot, master and crew, or other servants of the shipowner were excepted.

The question of law is what implied warranty of seaworthiness attaches to a contract of affreightment upon a voyage such as the present, when, from the necessity of the case, the ship cannot start upon the chartered voyage with an equipment of coal on board sufficient for the whole voyage, if the ship is to be a cargo-carrying vessel, which it clearly was the intention of all parties that it should be.

It cannot be denied that the implied warranty which primâ facie attaches to a charterparty such as the present is that the ship shall be seaworthy for the voyage at the time of sailing, by which is meant that the vessel shall then be in a fit state as to repairs, equipment, and crew, and in all other respects, sufficient to take her in ordinary circumstances to her port of destination, though there is no warranty that the ship shall continue seaworthy during the voyage.

That coals are part of the equipment of a steamship I do not doubt, and if the voyage in this case had been an ordinary voyage, as to which there was no necessity, as regards taking in coal, for dividing it into stages, it cannot be denied that the steamship was unseaworthy when she started from Cebu on her voyage to Liverpool, for the simple reason that she had not

then on board an equipment of coal sufficient to take her in ordinary circumstances to her port of destination.

To obviate this difficulty—and a great difficulty it is in cases of long voyages of cargo-carrying steamships, for it is manifest that no cargo-carrying steamship can ever be seaworthy when she starts upon such a voyage as the present, by reason of the impossibility of her having on board such an equipment of coal as will be sufficient to take her to the port of destination—it has become the practice, by reason of the necessity of the case, for cargo-carrying steamship owners to divide these long voyages into stages for the purpose of replenishing their ships with coal, and thus, as far as practicable, complying with the warranty of seaworthiness which attached when the ship commenced her voyage.

This practice was resorted to in the present case, for I find by the engineer's log that the voyage was divided into stages, and it appears from the average adjustment that the cargo owners subsequently acquiesced therein, the first stage being from Cebu to Colombo in Ceylon, the second from Colombo to Suez, and the third from Suez to Liverpool. At Colombo the ship accordingly called, and took in coal for the second stage; but the learned judge has found, and there certainly was evidence to support his finding, that the ship did not at Colombo take in a sufficiency of coal for the second stage to Suez, and thus, by reason of the coal falling short whilst passing up the Red Sea, the defendants' copra was resorted to in order to carry the ship on to Suez, where she again coaled, and so was enabled to perform her chartered voyage to Liverpool.

As to the question of fact, it was argued, on behalf of the plaintiffs, that the learned judge was in error in finding that the ship was not fully equipped with coal when she started upon the second stage from Colombo to Suez, and this argument was principally based upon the engineer's log; but the document, when looked at, has been so much altered that little if any reliance can be placed thereon. In my opinion Gorell Barnes J. has dealt with the question of fact in the proper manner by investigating the amount of coal consumed by the ship at different parts of the voyage, and I agree, not only in

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the result he has arrived at, but with the reasons he has given, which are fully set out in his judgment.

I come to the point of law, which is this: what was the implied warranty, if any—it matters not whether it is called a warranty or an absolute condition—when the ship started upon the second stage from Colombo to Suez? Was there then an implied warranty that she had a sufficiency of coal on board for this second stage, that is, that she was seaworthy for that stage? This is the real point in the case. The shipowners assert that there is no such warranty, and that the sole obligation they were then under to the cargo owners was that their master and crew should not negligently omit to take in coal at Colombo, or during the stages subsequent to the first stage, and that, although the ship might during the second stage in this case have put into Perim and obtained coal, and although it might be negligence for the master and crew not to have done so, as negligence of the master and crew is excepted by the charterparty, the shipowners are not liable to the cargo owners for having burnt up their cargo for fuel as they did.

Now, reduce this contention of the shipowners into a concrete case, to see what in practice it amounts to. Take, for instance, the case of a cargo-carrying steamship commencing a voyage of some 5000 miles in length, and the shipowners for coaling purposes, by reason of the necessity of the case, having to divide the voyage into five stages of 1000 miles each. The shipowners must admit that they warrant to the cargo owners that their ship has a sufficiency of coal on board for the whole voyage, when it commences that voyage; but they assert that by reason of their dividing the voyage into stages, although for their own purposes, this warranty is thus cut down to the first stage of 1000 miles, and that as regards the residue of the stages, 4000 miles in all, there is no warranty that the ship has a single ton of coal on board, and that the only liability they are under to the cargo owners during the residue of the voyage is for the negligence, if any, of their master and crew, for not taking coal on board when they might have done so; and as the negligence of the master and crew is excepted by the charter-

party, the shipowners are under no liability whatever to the cargo owners during the transit of the 4000 miles. I am asked to hold that this is the true meaning of the charterparty in the present case. I certainly cannot do so. On the other hand, the contention of the cargo owners is that, whether the shipowners divide the chartered voyage into stages or not for coaling purposes, that has nothing to do with them; but if, from the necessity of the case, the shipowners do so, the cargo owners in no way abandon the undoubted warranty they have at the commencement of the voyage.

The only way in which this warranty can be complied with is for the shipowners to extend the existing warranty to the commencement of each stage, and I can see no reason why such a warranty should not be implied, and I have no difficulty in making the implication, for it is the only way in which the clear intention of the parties can be carried out, and the undoubted and admitted warranty complied with. It appears to me to be no answer to say that it is a warranty subsequent to the commencement of the voyage.

In my judgment when a question of seaworthiness arises between either a steamship owner and his underwriter upon a voyage policy, or between a steamship owner and a cargo owner upon a contract of affreightment, and the underwriter or cargo owner establishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the contracted voyage, it lies upon the shipowner, in order to displace this defence, which is a good one, to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case, and that, at the commencement of each stage, the ship had on board a sufficiency of coal for that stage—in other words, was seaworthy for that stage. If he fails in this he fails in defeating the issue of unseaworthiness which primâ facie has been established against him. In each case it is a matter for proof as to where the necessity of the case requires that each stage should be, and I think that in the present case the necessity for coaling places at Colombo and Suez has been established.

This question of dividing up voyages into stages, as regards

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the warranty of seaworthiness, is by no means destitute of authority.

There are numerous cases decided upon policies of marine insurance when the voyage is divided into stages, and there is also a case in this Court relating to the warranty of seaworthiness upon a contract of affreightment when the voyage was divided into stages.

As regards the first class of cases it suffices to cite from a judgment of Lord Penzance, when delivering the judgment of the Judicial Committee of the Privy Council, consisting of himself, Sir William Erle, and Giffard L.J., in the case of the *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada* (1), where the numerous prior authorities relating to voyages consisting of different stages are referred to. Lord Penzance says: "The case of *Dixon* v. *Sadler* (2) and the other cases which have been cited, leave it beyond doubt that there is seaworthiness for the port, seaworthiness in some cases for the river, and seaworthiness in some cases, as in a case that has been put forward of a whaling voyage, for some definite, well recognised, and distinctly separate stage of the voyage. This principle has been sanctioned by various decisions; but it has been equally well decided that the vessel in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthiness, must be properly equipped, and in all respects seaworthy for each of these stages of the voyage respectively at the time when she enters upon each stage, otherwise the warranty of seaworthiness is not complied with. It was argued that the obligation thus cast upon the assured to procure and provide a proper condition and equipment of the vessel to encounter the perils of each stage of the voyage, necessarily involves the idea that between one stage of the voyage and another he should be allowed an opportunity to find and provide that further equipment which the subsequent stage of the voyage requires; and no doubt that is so. But that equipment must, if the warranty of seaworthiness is to be complied with"—that is, the warranty at the time of the commencement of the voyage—" be furnished before the vessel

(1) L. R. 3 P. C. 234, at p. 241. (2) 5 M. & W. 405, at p. 414.

enters upon that subsequent stage of the voyage which is supposed to require it." Read into this judgment the word "shipowner" in the place of "the assured," and the judgment is in point in the present case.

There is no difference between the implied warranty of seaworthiness which attaches at the commencement of the voyage in the case of an assured shipowner and in the case of a shipowner under a contract of affreightment. In each case the shipowner warrants that his ship is seaworthy at the commencement of the voyage. What Lord Blackburn said in *Steel* v. *State Line Steamship Co.* (1) in the House of Lords, as to the warranty of seaworthiness which attaches to "contracts for sea carriage," shews that it is the same warranty as that which attaches when a shipowner insures his ship with an underwriter.

The judgment of the Privy Council contemplates, it will be seen, stages of necessity, and I can see no difference in principle between physical stages of necessity, and other stages of necessity, as to the implication of a warranty attaching thereto. But there is also the case in this Court of *Thin* v. *Richards* (2), which I am unable to distinguish in principle from the present case.

It was an action by cargo owners against shipowners for non-delivery of cargo, and the point which arose was as to whether there had been a breach of the warranty of seaworthiness when the ship commenced its voyage. The ship was chartered for a voyage from Oran, in Algiers, to Garston Dock, Liverpool, with liberty to call at any ports in any order. There was also an exception as to the negligence of the master and crew. According to the usual practice the ship, having left Oran with a light cargo of esparto grass, proceeded to Huelva, in Spain, and there filled up with iron ore, and was subsequently lost on her chartered voyage. It was proved that when the ship left Oran on her voyage she had not a sufficiency of coal on board to take her to Liverpool, nor did she fill up at Huelva with a sufficiency of coal to take her on to Liverpool. The not taking on board sufficient coal at Huelva arose by reason

(1) 3 App. Cas. 72, at p. 86. (2) [1892] 2 Q. B. 141.

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of the negligence of the engineer. This Court (Lord Esher M.R., Fry and Lopes L.JJ.) held that whether the voyage was to be taken to be a voyage from Oran to Liverpool, or a voyage divided into stages—that is, from Oran to Huelva, and from there to Liverpool—the ship was unseaworthy, and gave judgment accordingly; for, said the Court, whether the voyage is taken to be an undivided voyage from Oran to Liverpool, or a voyage divided into stages, the ship was unseaworthy. If the commencement of the voyage was to be taken as from Oran, then she had not a sufficiency of coal on board for the voyage from Oran to Liverpool, or if the commencement of the voyage was to be taken as the stage from Huelva to Liverpool, then she had not sufficient coal on board for that stage, and consequently, whichever the voyage was, the implied warranty had been broken. The doubt expressed by Lord Esher as to whether it was a voyage divided into stages seems to me to have been not that a voyage could never be divided into stages if the necessity of the case required it, but whether in such a comparatively short voyage as from Oran to Liverpool the necessity of dividing the voyage into stages had been established by proof.

In my judgment Gorell Barnes J. was correct when he held, upon the facts of this case, that there was a necessity for dividing the voyage for coaling purposes into the stages into which it was divided, and that, therefore, the warranty of seaworthiness existed at the commencement of the second stage at Colombo, that the ship had not then sufficient coal on board for this second stage, and that the defendants were right in their contention.

Under these circumstances it is unnecessary to embark upon the point raised as to general average.

COLLINS L.J. I will add a few words to the judgment which has just been delivered.

I think the difficulties which have been suggested in this case are very much diminished when it is realized that the warranty of seaworthiness has always been relative. Though absolute when it attached, its precise extent and limitations

were relative, and varied according to the standard which the parties must have been supposed to contemplate as applicable to the adventure. A good instance of this principle is to be found in *Burges* v. *Wickham* (1), where the standard of seaworthiness required was determined by reference to the class of the vessel which, to the knowledge of both parties, was intended to be insured. That was the case of a vessel built for river navigation sent on an ocean voyage, and the warranty was held to be satisfied by proof that it had been made as fit as was reasonably possible for a vessel of such a description.

The cases cited by A. L. Smith L.J. are other instances of the same principle. The custom of a particular trade, e.g., the Greenland whale-fishing—Arnould, p. 654, 5th ed.—or the convenience of the parties to a particular adventure, may make it reasonable that the vessel should be equipped up to a different standard at different stages of the voyage, and the warranty of seaworthiness has to be adjusted accordingly. It is a necessary corollary of this principle of varying standards at different stages that at each stage the vessel shall conform to the standard required for that stage. I regard this not so much as a concession to the shipowner as an adjustment of the standard of seaworthiness to the requirements which the conditions of the adventure, according to the understanding and convenience of both parties, demand.

To come to the case before us, it is obvious that the convenience of both parties required that the adventure should be carried out by a steamer, and that it was not reasonably possible for the steamer in question to take coals enough, in addition to her cargo, to carry the vessel to her ultimate destination at a reasonable rate of consumption for a vessel of her class. It is obvious, therefore, that the common purpose could not be reasonably carried out unless the vessel's stock of coal should be from time to time replenished. The warranty of seaworthiness, therefore, must be construed by reference to the reasonably possible standard applicable to such a vessel on such a voyage. The voyage, therefore, for this purpose must be looked upon as divided into stages, with the necessary incident that the warranty must be adjusted accordingly. It follows that the

(1) 3 B. & S. 669.

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warranty must cover a condition that the vessel shall, at the commencement of each stage, be in this respect seaworthy for that stage. The warranty was, as I have pointed out, in its inception relative—that is to say, varying according to the standard reasonably applicable to the contemplated conditions.

Following the process of evolution through which modern commerce has passed, the warranty must be made to conform to modern exigencies—that is, to the rules of convenience which regulate the practice of merchants in respect of particular voyages. To say, as counsel for the appellants contended, that the warranty is limited to the first stage, and is satisfied if the vessel is fit to perform it, is, as it seems to me, to ignore the principles out of which the doctrine of stages was evolved, and to accept it partially only and not in its entirety. The doctrine of stages involves a recurring obligation to bring the vessel up to the required standard at each stage. It cannot be accepted with an illogical limitation. It must be accepted altogether or not at all. Accepting, as I do, Gorell Barnes J.'s findings of fact for the reasons given by him and by A. L. Smith L.J., it follows that, whether Colombo to Suez or to Port Said is regarded as the second stage in the contemplated voyage, the warranty of seaworthiness as to coal supply was not complied with—to which, of course, negligence, though excepted, is no answer—and therefore that the shipowners are liable to make good the value of the copra consumed by reason of the breach of warranty.

The question in this case is as to coal only; but whether the voyage, for the purpose of applying the warranty of seaworthiness, may be deemed to be divided, and what the stages are to be, must be determined with reference to the subject-matter in each case by what may be taken as the exigencies of the adventure as contemplated by the parties having regard to the ordinary course of business.

*Appeal dismissed.*

Solicitors for appellants (plaintiffs): *Holman, Birdwood & Co.*

Solicitors for respondents (defendants): *Rowcliffes, Rawle & Co., for Hill, Dickinson & Co., Liverpool.*

T. L. M.

## DAVIES and Another *v.* JONES.

1899
*March* 24.

*Probate—Costs—Rules of Supreme Court, Order* XXI., *r.* 18; *Order* LXV., *r.* 1.

The general rule, that in cases tried with a jury costs follow the event, as, also, the exception engrafted on this rule by the Probate rule protecting a defendant from being ordered to pay costs where he has duly delivered a notice of his intention to call no witnesses, and merely requiring the will to be proved in solemn form, have been superseded by Order XXI., r. 18, as now amended. (1)

The effect of that rule as amended is that, whether he has asked for a jury or not, a defendant who duly gives notice under the rule is not to be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will.

The plaintiffs, as executors, propounded the will, dated March 20, 1883, of John Jones, late of the Emlyn Arms Hotel, Newcastle Emlyn, in the county of Caermarthen, who died there on June 17, 1898.

The defendant, who was the testator's widow, pleaded undue execution of the will and want of knowledge and approval of its contents, and she delivered, as particulars of the latter plea, "that the said deceased gave no instructions for the said will and the same was not read over or properly explained to him, and that he was drunk or suffering from the effects of drink at the time the will was made, and that he did not understand the nature and effect thereof."

The defendant also gave notice, with her defence, that she merely insisted upon the alleged will being proved in solemn

(1) Rules of Supreme Court, Order XXI., r. 18, as amended July, 1898, is as follows:—

"In probate actions the party opposing the will may, with his defence, give notice to the party setting up the will that he merely insists upon the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, *and shall not, in any event, be liable to pay the costs of the other side unless the judge shall be of opinion that there was no reasonable ground for opposing the will.*"

The words in italics were substituted for the former concluding words of this rule.

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form, and only intended to cross-examine the witnesses produced in support thereof.

Sarah Daniell (formerly Morgan), the surviving attesting witness, stated that in 1883 she was in service at the Wilkes Head Hotel, Llandyssal. The deceased used to come to the hotel, and she saw him and Mr. Lloyd, solicitor, of Llandyssal, many times at the hotel together. On one occasion her mistress asked her to sign her name to a document. [Will identified.] Her mistress told her to write her name, as thereon appearing. The deceased and Mr. Lloyd and the landlady were all there. The witness was backwards and forwards, in and out of the room where they were, but did not see the deceased write his name. She remembered his going to sleep on the sofa, after witness had signed, and remembered also that he asked her to wake him. Mr. George (plaintiffs' solicitor) came and questioned witness, before which time Mrs. Jones, the defendant, had been to see her once.

In cross-examination, witness stated that, on the occasion of the will-making, the deceased came a little after Mr. Lloyd, and asked for him. She thought the deceased had been drinking a little when he came to the hotel. He went and spoke to the landlady, and then he and she went to the commercial room together. Witness went to that room in answer to the bell, and took them some drink twice. She did not see either the deceased or Mr. Lloyd sign their names.

[THE PRESIDENT. Do you mean you do not remember, or do you say that you did not see them sign? Witness: I did not see them sign.]

Her mistress told her to write her name, but witness did not know that it was a will. The deceased was leaning with his arm on the table at the time.

Re-examined: When witness was interviewed by plaintiffs' solicitor, she did not remember having written her name on the document. Neither did she remember having done so, when she saw the defendant. She had not seen the defendant's solicitor. She was unable to say for certain whether the name "John Jones" was written, or not, when she went into the room; neither could she say for certain when the signature of

the other attesting witness (Mr. Lloyd) was written. She was asked by Mr. Lloyd to go and fetch pen and ink; and after these were brought she did not leave the room again till she had signed her name. She wrote her name when she went in with the pen and ink.

Evidence was given by the plaintiffs' solicitor, who knew and did business with Mr. Lloyd before and after the time of the will; and also by Mr. Davies, one of the plaintiffs, whom the deceased asked to act as one of his executors, and to whom he made declarations, as lately as 1897, to the effect that he had not altered his will. A clerk, who was in the service of Mr. Lloyd at the time the will was made, and who made notes and entries in relation thereto, also gave evidence and identified the entries.

The jury found for the plaintiffs, and the Court pronounced for the will.

*Priestley*, for the plaintiffs, asked that costs should follow the event. He referred to the Rules of the Supreme Court, Order XXI., r. 18; to the note thereunder in Annual Practice, p. 300; and to *Foley* v. *Brogan*. (1) [He also cited the Rules of the Supreme Court, Order LXV., r. 1.]

*Barnard*, for the defendant, asked for costs out of the estate. If the class of witness in this case is called in to attest a will, the testator and his estate must take the risk. The defendant is supporting the children out of the income she derives from her life interest under the will. If she is condemned in costs, or if she has to pay even her own costs, the children will suffer with her.

THE PRESIDENT. I find that this litigation has not arisen in any sense from the fault of the testator. He called in a competent solicitor to make his will, and it cannot possibly be suggested that the fact of that solicitor having died is a matter which the testator ought to have foreseen. The rule of practice, allowing the costs of the unsuccessful party out of the deceased's estate, in cases where the litigation has arisen

(1) (1883) 11 L. R. Ir. 421.

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wholly or partly through the testator's own fault, is, I think, the right rule to follow. Under these circumstances, I cannot accede to the application of the defendant's counsel, to allow the costs of the defendant to be paid out of the testator's estate.

As to the plaintiffs' application, that I should condemn the defendant in the costs of this litigation, I propose to deal with the matter on the words of the amended rule 18. Before the amendment in that rule was made, I daresay it may have been the case that, where a jury had been called for—at least if it was the defendant's jury—the defendant was liable to be condemned in costs, notwithstanding any notice given with the defence that the defendant only intended to cross-examine the witnesses to be called in support of the will, and this constituted an exception in the general rule that a defendant who gave such a notice was not liable to pay costs. But, in my view, the general rule, as well as the exception, were swept away by Order XXI., r. 18, as amended, which was intended to establish a new, and, in my judgment, a complete rule of practice, namely, that a defendant giving the notice of intention only to cross-examine is not to be liable to pay the costs of the other side, "unless the judge shall be of opinion that there was no reasonable ground for opposing the will." I think this rule governs the matter whether there be a jury or not, and whatever be the verdict of the jury.

Then, was there, in this case, reasonable ground for opposing the will? It does not at all follow that, because a defendant fails, there was no reasonable ground. I think that this was, upon the face of it, a just and proper will. But what remains? The solicitor who drew it, and who was present at its execution, is dead. One of the attesting witnesses is dead; and the only living witness of its execution is a person whose uneducated recollection is extremely vague. Under these circumstances, it is not unreasonable that she should be put into the witness-box, to state upon oath what took place and to be cross-examined as to her recollection of the matter. In my opinion it would be a hardship if I were to order the defendant to pay the costs of this action. Therefore, the old practice, where

notice has been given with defence, will be followed, and there will be no order as to costs. 1899

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Solicitors for plaintiffs: *Nelson & Son, for William Evans George, Newcastle Emlyn.*

Solicitors for defendant: *Greig, Meikle & Briggs, for J. H. Evans, Newcastle Emlyn.*

H. D. G.

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## THE KATE.

1899

*March* 20; *April* 11.

*Admiralty—Collision—Practice—Total Loss—Vessel in Ballast under Charter—Restitutio in Integrum—Measure of Damage.*

The plaintiffs' barque, whilst proceeding in ballast from London to a North American port under charter to load a cargo for the Continent, came into collision with the defendants' steamer and was totally lost.

The defendants admitted liability, and, on the reference to assess the damages, the registrar, assisted by merchants, allowed a sum representing the value of the plaintiffs' barque at the date when she would have accomplished the homeward voyage, together with a sum for the loss of the profit which would have been realized under the charter.

On motion in objection to the report on the ground that, in the case of the total, as distinguished from the partial, loss of a vessel without cargo, the plaintiffs were only entitled to the market value of the vessel at the time of her loss:—

*Held*, by Sir F. H. Jeune P., confirming the report of the registrar, that the proper measure of damage was the value of the vessel at the end of the voyage, plus the profits lost under the charterparty.

*The Columbus*, (1849) 3 Wm. Rob. 158, and *The Clyde*, (1856) Sw. 23, considered.

MOTION in objection to the registrar's report.

The plaintiffs were the owners of the Norwegian barque *Chrysolite*. The defendants were the owners of the Austrian steamship *Kate*, and the question was as to the measure of damage in the case of the total loss, by collision, of a vessel on her way, in ballast, to load under charter.

The material facts were shortly that:—

On June 21, 1898, in a collision in the English Channel, near Alderney, between the *Chrysolite* and the *Kate*, the *Chrysolite* sustained such injury that she was treated as a

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constructive total loss, and, as the result of proceedings, the defendants agreed to pay 90 per cent. of the damages occasioned to the plaintiffs by reason of the collision.

The *Chrysolite* was, at the time of the collision, proceeding in ballast from London to Miramichi in Canada to load there a cargo of timber for Havre, under a charterparty dated Liverpool, May 10, 1898, and made between the agents of the owners of the vessel and the charterer, a merchant of St. John, New Brunswick.

The plaintiffs filed a claim for the loss of the vessel, her stores and incidental expenses, amounting to 1785*l.* 1*s.* 2*d.*, but practically only two of the thirteen items were disputed, namely, 1500*l.*, the value of the *Chrysolite* (less 375*l.* 14*s.* proceeds of sale), and 504*l.* 5*s.* loss of charter.

These two amounts were reduced by the registrar to 1000*l.* (less 375*l.* 14*s.*) as the value of the *Chrysolite* at the date when she would have accomplished the voyage to Havre, and 470*l.* as the loss of net freight which would have been earned had the *Chrysolite* reached Miramichi, taken in her cargo, and delivered it at Havre, making the total 1193*l.* 2*s.* 2*d.*, less the agreed 10 per cent., or in all 1073*l.* 16*s.* with costs, and interest at 4 per cent. per annum from the date when the *Chrysolite* might be expected to have arrived at Havre, namely, October 1, 1898, to January 25, 1899, when 765*l.* was paid to the plaintiffs (by way of tender, and found by the registrar to be insufficient), and on the balance—308*l.* 16*s.*—from January 26 until paid.

*Aspinall, Q.C.*, and *Stubbs*, for the defendants, the owners of the *Kate*. It is submitted that both on the question of the period of time when the value of the vessel is taken, and as to the allowance for lost profits under the charterparty, the report is in conflict with the settled practice of this Court, by which a clear distinction has always been drawn between a total and a partial loss. In the case of the total loss of a vessel without cargo, the measure of damage is the market value of the chattel at the time of her loss; the reason being that the owner can go into the market and buy a similar chattel to replace the

one lost: *The Columbus* (1); *The Clyde* (2); *The City of Rome.* (3)

*F. Laing*, for the plaintiffs, the owners of the *Chrysolite.* The principle upon which the Court proceeds in questions of this nature is that of restitutio in integrum, and the cases which have arisen have never thrown any doubt on this principle, but have turned on the question whether the amount claimed represented damage which was the natural and reasonable consequence of the act of the wrongdoer or was too remote: see *The Notting Hill.* (4)

It is clear that the owner of this vessel could not possibly go into the market, buy another vessel, and send her on the voyage in question in time to earn the profits contracted for on the homeward voyage; and therefore, unless the enhanced value of the vessel by reason of her profitable employment is taken into account, the principle of restitutio in integrum would not have been applied to this case. In *The Columbus* (5) Dr. Lushington fully admits the principle, but in the peculiar facts of that case he felt a difficulty in allowing the loss of profits claimed owing to their uncertain and speculative character.

The case of *The Clyde* (2) does not help the defendants, as there Dr. Lushington only refers to the dicta contained in his previous decision. In *The City of Rome* (3) the registrar found that the loss was speculative and too remote for assessment, and in that view he was upheld by Sir James Hannen; but in the present case there is no question about the precise nature and extent of the loss sustained by the plaintiffs. In *The Northumbria* (6) interest was added to the amount of the statutory liability of the owners of the wrongdoing ship in order to give additional compensation so as to represent to the owners of the other vessel her value at the end of the voyage.

Secondly, it is clear that, in the case of a partial loss, damages in respect of the loss of profit under the charter

(1) 3 Wm. Rob. 158, at p. 161.
(2) Sw. 23.
(3) *Shipping Gazette*, May 12, 1887.
(4) (1884) 9 P. D. 105, at p. 113.
(5) 3 Wm. Rob. 158.
(6) (1869) L. R. 3 A. & E. 6.

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would not be too remote: *The Star of India* (1); *The Consett* (2); *The Argentino* (3); and the practice has been for years past in the registry to make a similar allowance in the case of total loss where, as here, there is nothing speculative in the claim: *The Breeze.* (4)

*Aspinall, Q.C.*, in reply.

[Reference was made to the cases of the *British Columbia, &c., Co.* v. *Nettleship* (5), *The Risoluto* (6), and to Mayne on Damages, 5th ed. p. 409.

*Cur. adv. vult.*

April 11. THE PRESIDENT (SIR F. H. JEUNE), after referring to the facts already set out, continued:—The defendants dispute the right in law of the plaintiffs to recover this sum of 470*l.* or any part thereof, and they also, upon the evidence, challenge the value put upon the *Chrysolite.*

The first question is one of law, and it is contended on behalf of the defendants that the matter is governed by a rule of law and practice prevailing in the Court of Admiralty. Apart from such special rule, it would have appeared to me clear that in some way or other the principles upon which damages are assessed would require account to be taken of the profitable character of the charterparty under which the ship was at the time of her loss. The general principle which governs the assessment of damages is of course restitutio in integrum, qualified by the condition that the damage sought to be recovered must not be too remote—that is to say, must be the natural consequence, and not merely a consequence traceable in fact to the wrongful act. It may be nothing more than a question of statement of figures whether the owner of a vessel, lost when under a profitable charterparty, is recouped this loss by receiving her value at the conclusion of her voyage plus the profits of her charterparty, or by receiving her value at the time of collision, such value being enhanced by the fact that the

(1) (1876) 1 P. D. 466.
(2) (1880) 5 P. D. 229.
(3) (1889) 14 App. Cas. 519.
(4) (1884) 2 Pritch. Adm. Dig. 1762.
(5) (1868) L. R. 3 C. P. 499, at p. 507.
(6) (1883) 8 P. D. 109.

ship at the time was under a profitable charterparty. But, unless in one or other of these ways the owner gets the benefit of the profitable engagement of his ship, he obviously fails to realize a restitutio in integrum.

But it is said that there is a rule of law which prevents account being taken of freight or profit of that nature, if the ship be a total loss. The leading authority relied on in support of this proposition is *The Columbus* (1), decided in 1849. That was a case in which in a collision off Dungeness a smack was sunk, and her owner claimed not only the value of his vessel but further sums, first, for wages, which it was said he would have earned as master of the smack, and, secondly, for profits which it was supposed the smack would have made after the time of the collision. Both these further claims were rejected by Dr. Lushington. The learned judge, I think, recognised that even in the case before him the principle of restitutio in integrum was hardly carried out if the claims in dispute were rejected, but he based his decision on the rules and practice of the Court. I draw this conclusion from the following passage in the judgment (2) :—

"It has been argued on his behalf that the principle upon which this Court proceeds in all matters of this kind is a restitutio in integrum; in other words, the principle of replacing the party who has received the damage in the same position in which he would have been, provided the collision had not occurred. As a general proposition, undoubtedly, the principle in question is correctly stated; and not only in this Court, but in all other Courts, I apprehend the general rule of law is, that where an injury is committed by one individual to another, either by himself or his servant, for whose acts the law makes him responsible, the party receiving the injury is entitled to an indemnity for the same. But although this is the general principle of law, all Courts have found it necessary to adopt certain rules for the application of it; and it is utterly impossible, in all the various cases that may arise, that the remedy which the law may give should always be to the precise amount of the loss or injury sustained. In many cases it will.

(1) 3 Wm. Rob. 158. (2) 3 Wm. Rob. at p. 162.

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of necessity, exceed, in others fall short of the precise amount. To select an example amongst the cases which have occurred in this Court, I may here mention the case of the *Gazelle*, which has been brought to the notice of the Court, in which a larger sum was awarded than the actual loss sustained by the party suing in the cause. In respect to the question more immediately under consideration at the present moment, I do not recollect a case, and no case has been suggested to me, where a vessel has been considered as a total loss, and the full value of that vessel having been awarded by the registrar and merchants, any claim has been set up for compensation beyond the value of that vessel. When I first read the papers in this case, I looked with much care and attention to see whether any precedent could be found, whether any single instance had occurred in the numerous cases which have arisen . . . . but I found none, and the learned counsel who has argued the case on behalf of Mr. Woodward does not appear to have been more successful in his researches."

It would appear also that the learned judge was impressed by the difficulty of estimating the damage on the possible loss of profits and the speculative character of such an assessment. He says (1) :—

"The true rule of law in such a case would, I conceive, be this : namely, to calculate the value of the property destroyed at the time of the loss, and to pay it to the owners, as a full indemnity to them for all that may have happened, without entering for a moment into any other consideration. If the principle to the contrary, contended for by the owners of the smack in this case, were once admitted, I see no limit in its application to the difficulties which would be imposed upon the Court. It would extend to almost endless ramifications, and in every case I might be called upon to determine, not only the value of the ship, but the profits to be derived on the voyage in which she might be engaged, and indeed even to those of the return voyage, which might be said to have been defeated by the collision. Upon this consideration alone, I should not, I conceive, be justified in admitting this claim ; but I am further

(1) 3 Wm. Rob. at p. 164.

borne out in so doing by the difference which exists between a total loss, and the case of a partial damage, namely, that in the latter case the amount of the additional injury in the loss of the freight is capable of being accurately calculated. It depends upon no contingency; it is, in point of fact, an absolute loss, and, as such, the owner of the ship upon whom it falls is justly entitled to compensation."

It appears to me that, except on the ground of the uncertain and speculative nature of the claim, which certainly was its character in the case before Dr. Lushington, it would be difficult, on principle, to exclude such a claim. It was conceded in the argument before Dr. Lushington, and held by him, that in the case of the partial loss of a vessel an allowance for demurrage may be given, in addition to the cost of repairing the physical damage inflicted; and in the cases of *The Consett* (1) and *The Star of India* (2), it was held by Sir Robert Phillimore that, in the case of a partial loss, the loss of a profitable charterparty formed a proper element of compensation. The case of *The Argentino* (3) in the House of Lords is a conclusive authority that the loss of earnings in an employment contracted for is not too remote to constitute an element to be considered in the assessment of damages in the case of a partial loss.

It is no doubt a sound principle in the case of total loss that, speaking generally, to give a sum which will replace the vessel, is to give all that justice demands. It may, in such case, be fairly enough assumed that the substituted vessel will in the future be as profitable to her owner as that which has perished would have been. But to carry this principle so far as to say that a vessel lost at the commencement of her voyage is compensated for by her value, without regard to her profits during the voyage, when the owner could not in fact replace his lost vessel and earn those profits, appears to me to press theory into conflict with fact. And, if I am right in thinking that what influenced Dr. Lushington was the uncertain and speculative character of the claim before him, such consideration

(1) 5 P. D. 229. (2) 1 P. D. 466.

(3) 14 App. Cas. 519.

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certainly does not arise in a case like the present, where the claim is regulated by the terms of the charterparty in force at the time of the collision.

The case of *The Clyde* (1) was referred to before me as supporting the decision in *The Columbus*. (2) It might be expected to do so, as it was also a decision of Dr. Lushington. The learned judge in fact reiterates and explains his previous decisions. All he says is, "there was another case came before the Court where the vessel was totally lost and destroyed. A claim was made for consequential damage, but the Court held it had no discretion in the matter. All the remedy it could give was that of putting on the vessel at the time she was lost a market price; whereas in cases of partial loss there are other claims such as demurrage, and so on, which are always compensated. Therefore, what we have had to look at is, what would the vessel have fetched in the market at the period of its destruction."

It is to be observed that Dr. Lushington lays down that the value of the vessel to which, in the case of total loss, he confines the damages, is to be taken at the time of the loss, and he does not, I should suppose, in the case of a vessel under a profitable charter at the time of loss, intend to exclude the fact of that charter from entering into the computation of the market price of the vessel. If this element of value be admitted, a restitutio in integrum might, no doubt, by this process be effected.

The decision in the case of *The City of Rome* (3) appears to me to be practically identical with that in *The Columbus*. (2) The owner of a fishing vessel sunk in a collision claimed for the value of the fish which would have been caught between the date of the collision and the termination of the fishing season. The registrar held that the loss was too remote and speculative to be taken into consideration, and Sir James Hannen upheld that view.

"I consider," he said, "that the matter is concluded by authority; that when there is a total loss, the question of the

(1) Sw. 23. (2) 3 Wm. Rob. 158.

(3) *Shipping Gazette*, May 12, 1887.

value of things lost at that time is what is to be taken into account without reference to what a vessel would have earned if she had gone on a longer or a shorter voyage than the one on which she was engaged at the time."

Here, as in the case of *The Columbus* (1), nothing appears to be decided which would exclude a claim for enhanced value of a vessel at the time of her loss by reason of a profitable engagement which had been secured for her.

I should feel the greatest difficulty in even appearing not to follow implicitly a decision of Dr. Lushington on a point which he considers to be decided by the practice of the Admiralty Court, were it not that there is a later decision in this Court, and decisions also of registrars, which appear to me to be based on a different view of that practice. I refer first to the case of *The Northumbria* (2), decided by Sir Robert Phillimore in 1869. That was a case in which the owners of the *The Northumbria* (2) claimed to limit their liability in respect of damage occasioned by collision to a sum of 8*l.* for each ton of her tonnage, and the question was whether her owners were liable also to pay interest on such amount from the date of the collision. It was held that they were. In his judgment Sir Robert Phillimore stated the practice of the Admiralty Court as follows (3): "The practice under the old law, which decreed a restitutio in integrum by the wrongdoer to the sufferer, was as follows:—In the case of a vessel sunk with a cargo on board, the restitutio in integrum was effected by a calculation of the probable value of the ship at the end of her voyage, and of the freight which she would have earned, making at the same time certain deductions as to the expenses which the owners must have incurred in order to complete the voyage, such as the wages of the crew, &c., and also making a deduction for discount if the value found were paid before the probable end of the voyage. . . . In the event of the vessel sunk having no cargo, then interest upon the value of the ship from the day of the collision was given; the reason being, that in the former case, by giving freight you had really given the

(1) 3 Wm. Rob. 158. (2) L. R. 3 A. & E. 6.

(3) L. R. 3 A. & E. at p. 12.

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interest on the use of the vessel during the interval between the collision and her arrival in port; whereas, in the case of there being no cargo, there was no freight to represent the interest, and it was therefore expressly given. So that, in the first case, to have given interest as well as freight would have been to place the sufferer in a better position than he would have been but for the collision; and in the second case, to have refused him interest would have been to place him in a worse position on account of the collision than he would otherwise have been; whereas the principle of restitutio in integrum is to replace the sufferer in the condition in which he was at the time when the wrong was done."

It is clear, therefore, that in the opinion of Sir Robert Phillimore the practice was that if a vessel totally lost had cargo on board, the freight which she would have earned was to be allowed, and the value of the ship calculated as at the end of her voyage, and if she had no cargo on board interest was given from the time of the collision. The difference between the views of the practice of the Court of Admiralty taken by Dr. Lushington and Sir Robert Phillimore, both of course very high authorities on such a matter, is perhaps more apparent than real. Dr. Lushington indicates that the value of the vessel is to be taken at the time of the collision, which does not, as I have above suggested, exclude a fact such as the existence of a profitable charter from being allowed to enhance the value of the vessel at that time. Sir Robert Phillimore states that the value should be taken as at the end of the voyage, and therefore lets in freight or interest as an additional compensation. The result of the two calculations in figures should be practically identical.

The present case, which is that of a vessel without cargo, but under charter, being totally lost, is not exactly that contemplated by Sir Robert Phillimore; but it appears to me to follow from his judgment that the value of the vessel may in such case be taken as at the end of her voyage, and something allowed in respect of the period between the time of collision and the end of the voyage. What is that something? If there be cargo on board, Sir Robert Phillimore says that the

freight is to be allowed for; if no cargo be on board, then interest is to be allowed. But if the vessel be under charter it appears to me that a case arises in which the profits under the charterparty should take the place of interest, as more accurately representing the loss to the owner, and may fairly be considered to be the equivalent of freight when a cargo is on board. Indeed, I can see no distinction in principle between the case of freight when a cargo is on board and the present case of a charterparty under which cargo is to be taken. The engagement under which, in both cases, the vessel is employed equally removes the claim from the region of speculation, and in neither case can it be said to be too remote.

I think, therefore, that the proper measure of damage in this case is the value of the vessel at the end of her voyage, plus the profits lost under the charterparty, and this is what the learned registrar has allowed. There is, however, further authority on the practice of the Admiralty Court, to which so much weight was attached by Dr. Lushington. So far as can be judged from the instances collected in Pritchard's Admiralty Digest, claims similar to the present have for more than thirty years invariably been dealt with by registrars and merchants in the manner adopted by the learned registrar in the present case. There is an instance of a vessel run down and totally lost in the English Channel while on a voyage from Newcastle with a cargo of coals for Cadiz, whence she was to carry a cargo of salt to South America pursuant to a charterparty entered into before she left Newcastle, in which case it was held that the owners were entitled to net freight not only on the coal, but also on the salt cargo: *H.M.S. Fork*. (1) No objection was taken to the report of the registrar. In another case no objection was raised to the decision of the registrar where a steamer on her way to Middlesbrough in ballast, and chartered to carry a cargo of pig iron thence to Dantzic, and return with a cargo of oak staves to London, was sunk in a collision, and the freight for both voyages was allowed less the probable cost of earning it: *The Breeze*. (2) There is another case decided by the registrar without objection which is, I think, exactly in

(1) (1864) 2 Pritch. Adm. Dig. 1761. (2) 2 Pritch. Adm. Dig. 1762.

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The President.

point. The plaintiffs, claiming for the total loss of their vessel on her outward voyage, were allowed the homeward freight which would in all probability have been earned, under a charterparty in force, if the collision had not occurred: *The Appendix*. (1) I find, on the other hand, that when there was apparently no existing charterparty (*The Undine* (2)), and when the claim was in respect of a future voyage for which no preparation had been made (*The Kaikoura* (3)), a claim for freight was disallowed; but it was in the first case for the reason, as expressly stated, that the claim was problematical, and in the second case in all probability for a similar reason.

It was also argued before me that the learned registrar did not calculate the value of the vessel at the end of her voyage, and even if he did that the value placed by him on the vessel is exaggerated. To this the reply made seems to me conclusive. The learned registrar clearly did, and says that he did, take the value of the vessel at the end of her voyage, and I am satisfied that there was ample evidence before him to justify the figures at which he arrived. I think, therefore, that the report of the learned registrar is correct, and ought to be confirmed.

*Motion in objection to the report dismissed with costs.*

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Stokes & Stokes.*

(1) (1872) 2 Pritch. Adm. Dig. 1761. (2) (1857) 2 Pritch. Adm. Dig. 1761.
(3) (1885) 2 Pritch. Adm. Dig. 1762.

T. L. M.

## THE PRINS HENDRIK.

1899
*April* 25.

*Admiralty—Compulsory Pilotage—Liability of Owner—Dutch Law—Collision in the river Scheldt.*

A collision occurred off Flushing at the mouth of the river Scheldt, between a British and a Dutch steamship. In an action by the owners of the former, the owners of the latter pleaded, inter alia, that their vessel was at the time in charge of a Dutch pilot by compulsion of law, and that the negligence, if any, was solely that of the pilot.

The Court found that the collision was due to the negligent navigation of the Dutch vessel, and, after evidence had been given as to the Dutch law on the question of compulsory pilotage:—

*Held*, by Gorell Barnes J., that, though the employment of the pilot was compulsory, the pilot acted as the adviser of the master who remained in charge, and, therefore, the owners of the Dutch vessel were liable for the damages sustained by the owners of the British vessel.

ACTION of damage by collision.

The plaintiffs were the Goole Steam Shipping Company, Limited, owners of the *Gotha*; the defendants were the Zeeland Steamship Company of Flushing, owners of the *Prins Hendrik*.

The case is reported on the question of the liability of a shipowner for damage resulting from the negligent navigation of his vessel whilst under compulsory pilotage in Dutch territorial waters.

The material facts were shortly as follows:—

On January 21, 1899, about midnight, the *Gotha*—a British screw steamship of 698 tons gross register, a crew of sixteen hands, from Ghent to Goole, with a general cargo—was off Flushing at the mouth of the river Scheldt. The weather was fine, the wind strong from the S.W., and the tide ebb of the force of about two knots. The *Gotha* had rounded to under a starboard helm until she headed about S.S.W., for the purpose of landing her river pilot, and then, having hard-a-ported her helm, was proceeding on her course for the East Gat, heading about N.W. b. N. and making about eleven knots, when the *Prins Hendrik*—a twenty-knot Dutch paddle steamship of 2000 tons gross register, a crew of sixty-three hands, from Flushing to Queenborough with passengers and mails—overhauled her on the starboard side, and in attempting, before

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she was clear, to cross the bows of the *Gotha*, with her port sponson struck the *Gotha* on the starboard bow, damaging some of the plates of the *Gotha*, but above water, so that that vessel was able to proceed, whilst the *Prins Hendrik* sustained such damage to her own port paddle-wheel that she became unmanageable, and, after dropping her anchor, she swung on to the Nollenplaat sands.

The plaintiffs, the owners of the *Gotha*, established to the satisfaction of the Court the charges they brought against the servants of the defendants, the owners of the *Prins Hendrik*, of not keeping a good look-out, failing to keep out of the way of the *Gotha*, under art. 20 of the Regulations for Preventing Collisions at Sea, and not slackening speed under art. 23 of the same regulations; whilst the defendants failed in all their allegations of negligence against the servants of the plaintiffs, framed on the regulations for preventing collisions on the open waters of the State in force under the Royal Netherlands decree of May 18, 1892, as modified by the decree of July 16, 1892, and on the international regulations for preventing collisions at sea. They also failed to establish a charge of not standing by in accordance with the provisions of s. 422 of the Merchant Shipping Act, 1894, leaving only the further allegation that "as far as the said collision was caused or contributed to by any negligent navigation of the *Prins Hendrik* (which the defendants deny) it was occasioned solely by the default or neglect of the pilot, who, being a duly licensed pilot for the district, was by compulsion of law in charge of the *Prins Hendrik*, all whose orders were duly obeyed by the servants of the defendants on board the *Prins Hendrik*."

The onus being on the defendants to prove that the pilot was compulsorily in charge, they called Michael Jacques de Witt Hamer, a lawyer of Middleburg, Holland, who, in his examination-in-chief in support of the view that the pilot was in charge, referred to and relied on art. 363 of the Dutch Commercial Code (1); arts. 1, 3, 5 of the law of August 20,

(1) Code of Commerce of Holland, bk. ii.; Rights and Duties connected with ships, ch. iii. Commanders. Art. 363: "He must employ pilots wherever custom, law or prudence require."

1859, on the pilotage of vessels navigating the high seas, as modified by the law of April 6, 1875 (1), and particularly on art. 56 of the General Regulations on the pilotage service fixed by Royal Decree of January 23, 1879. (2)

In cross-examination, art. 534 (3) of the Dutch Commercial Code was referred to, and Mr. de Witt Hamer admitted that, as a general principle, the ship doing the wrong must make it good without reference to the question of pilotage, as, by the law of Holland, according to the most recent decisions (4), the

(1) Art. 1: "To the State belongs the exclusive right of piloting sea-going vessels to and from the outlets and seaports, as also in the rivers, streams, navigable waters and canals of this kingdom; as likewise the levying of the pilotage dues exacted for this service.

"The pilotage service is performed by pilots duly examined and sworn, provided with a commission to that effect, and wearing the badge of a pilot."

Art. 3: "To this law are subjoined tariffs . . . . fixing the amount of dues for the pilotage service mentioned in those tariffs, relative to the districts of: . . . . 6. Mouths of the Scheldt."

Art. 5: "The commanders of inward or outward bound sea-going vessels . . . . are obliged, where the pilotage service in those waters has been regulated by a general ordinance of the Government, to employ the regular pilots, and to pay the pilotage dues fixed by tariff. . . . .

"If a commander has not availed himself of the services of a pilot who might have been obtained, the pilotage dues must nevertheless be paid in full according to the tariff."

(2) Art. 56: "The pilotage of vessels during the night in the outlets or on the rivers and streams, may only be performed with the approbation of the captain and conjointly with him.

"In case any difference should arise between the captain and pilot, respecting the commencement and continuation of the pilot's voyage, or the navigation of the vessel, especially in circumstances, as well by day as by night, when the buoys and marks cannot be seen and distinguished at a proper distance, and the directions of the pilot are not attended to, or should the captain offer any impediment to the pilot in the performance of his functions, the latter must openly on deck, and in the presence of the crew, declare, that he can in such a manner no longer be answerable for the safety of the vessel. From that moment the responsibility of the pilot ceases."

(3) Art. 534: "When a ship through the default of her commander or crew, runs down, fouls, or comes into collision with another and does damage to her, the whole of the damage sustained by the ship and the goods on board must be made good by the commander of the ship which has caused the damage."

(4) By the tribunal at Amsterdam, March 14, 1860 (Dutch Law Journal, No. 2914). By the Court of Appeal, Amsterdam, December 24, 1885 (Law Journal, No. 5309). By the tribunal at Rotterdam, December 1, 1883 (Law Journal, No. 4976). By the tribunal at Middleburg, June 6, 1896 (Law Journal, No. 5377). By the Court of Appeal at the Hague in the case of *The Lady Salisbury*, March 29, 1897 (Law Journal, No. 6964).

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fact that a pilot is on board does not relieve the shipowner from responsibility for damage done to other vessels, the master of the wrongdoing vessel being personally sued with a remedy over against his employers.

*F. Laing*, and *Lauriston Batten*, for the plaintiffs, the owners of the *Gotha*, elected not to call any evidence as to the law relating to compulsory pilotage in Holland, and contended that the owners of the *Prins Hendrik* were liable for the negligent navigation of the vessel for, though by Dutch law, as proved by the evidence produced by the defendants, pilotage is compulsory in the district in question, namely, the mouth of the Scheldt, in the sense in which it is compulsory elsewhere abroad (1)—that is to say, the pilot must be employed and the dues paid; yet the true construction of art. 56 of the general regulations was that the pilot, in the event there provided for, and on complying with the prescribed formalities, ceased to act as adviser to the master, who then continued in charge on his own responsibility without the assistance of the pilot.

*Butler Aspinall, Q.C.*, and *Stubbs*, for the defendants, contended that the plea of compulsory pilotage had been successfully established, for the *Prins Hendrik*, as an outward-bound sea-going vessel, within the pilotage district of the mouth of the Scheldt, was required to have, and had on board, a duly licensed pilot for the district. Her master was by art. 363 of the Dutch Commercial Code bound to take this pilot, and by art. 5 of the law of August 20, 1859, he was obliged to pay the dues for his employment. It was clear from the evidence that the pilot was, in fact, in charge—that is to say, he was in fact controlling the navigation of the vessel, and all his orders were being obeyed. Under these circumstances, harmony existed between the pilot and the master, and, according to the construction put upon art. 56 of the pilotage regulations by the Dutch lawyer that, so long as harmony existed between the

(1) See as to the Suez Canal: *The Guy Mannering*, (1882) 7 P. D. 52, 132. As to the Seine: *The Augusta*, (1887) 6 Asp. M. L. C. 161. As to the Danube: *The Agnes Otto*, (1887) 12 P. D. 56.

master and the pilot, the pilot was in charge of the vessel, and it was not until after disagreement that the master took charge.

Assuming that, according to recent decisions in the Dutch courts, the shipowner could not rely, in Holland, upon pilotage as a defence, that did not affect the right of the owners of the *Prins Hendrik* when sued in this country to claim exemption from liability under the provisions of s. 633 of the Merchant Shipping Act, 1894, in the case of damage occasioned by the fault of the pilot compulsorily employed: *The Halley*. (1)

GORELL BARNES J. [After dealing with the facts already set out as to the navigation of the two vessels, and dismissing the charge against the *Gotha* of not standing by, the learned judge continued:—]

It is said by the defendants that the *Prins Hendrik* was in charge of a pilot whose employment was compulsory by law, and that if the collision were caused by the *Prins Hendrik*, it was solely through the default of the pilot. On this point evidence has been given by a Dutch lawyer, and reference has been made to the Commercial Code together with the regulations affecting pilots; but it appears to me, after considering the clauses of the code, and the articles of the regulations to which my attention has been drawn, and after hearing the evidence of the lawyer, that pilotage is not compulsory in the sense in which it has to be compulsory according to English law in order to discharge the owners from liability for the fault of the pilot. It seems to me that the position of the pilot according to Dutch law is very much the same as in other countries where a pilot has to be taken and paid for, but the charge of the ship is not surrendered to him. In my opinion the words "with the approbation of the captain and conjointly with him," which occur in art. 56 of the pilotage regulations, serve to shew that the pilot cannot be said to take sole charge in the way contemplated by English law; and in my judgment pilotage is not compulsory in the sense I have mentioned above. That seems to be also the view taken in Holland, according to the

(1) (1868) L. R. 2 P. C. 193.

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cases which have been referred to. [The learned judge then dealt with the charges of negligence made by the plaintiffs and defendants respectively, and proceeded:—]

With regard to the general navigation of the *Prins Hendrik*, there cannot be any doubt, having disposed of the question of pilotage, that the owners of that vessel are responsible, for those in charge of the *Prins Hendrik* could not tell which of three things the *Gotha* might be doing. She might be going up river; secondly, she might be going straight down in the same way as the *Prins Hendrik*; and, thirdly, I am told that almost all the trading traffic goes out through the East Gat, so that it was highly probable that the *Gotha* was going to turn round and go through that channel. The worst thing, therefore, that could be done was to try and pass her at, at least, fifteen knots, as, until it was seen what she was doing, those in charge of the *Prins Hendrik* were not justified in going at that speed. They went too fast alongside the *Gotha*, and, according to their own log, they tried at full speed to gain on her and cross in front of her. I have consulted with the Elder Brethren on the nautical questions involved, and they agree with me in thinking that the fault was in attempting to pass the *Gotha* in the way those in charge of the defendants' vessel tried to do. I must, therefore, hold the *Prins Hendrik* alone to blame for this collision.

Solicitors for plaintiffs: *Pritchard & Sons, for Andrew M. Jackson & Co., Hull.*

Solicitors for defendants: *Stokes & Stokes.*

T. L. M.

## WESTMACOTT *v.* WESTMACOTT.

1899
*Feb.* 17.

*Divorce—Evidence of Marriage—Proof of Marriage between Christians in British India—Indian Act XV. of* 1872 (*The Indian Christian Marriage Act of* 1872)—*The Births' and Deaths' Registration Act*, 1836 (6 & 7 *Will.* 4), *c.* 86, *s.* 38—*List of Registers and Records in the Custody of the Registrar-General at Somerset House.*

The solemnization of a marriage between Christians in British India is proved by the production of a certificate of the marriage from the India Office.

PETITION by Anna Mary Charlotte Westmacott for a judicial separation from her husband, Edward Vesey Westmacott, on the ground of his adultery.

It appeared that the respondent was an Indian Civil servant, and that he and the petitioner were alleged to have been married according to the forms of the Church of England in St. Paul's Cathedral at Calcutta in 1874. A certificate of the marriage was produced from the India Office, and evidence of the alleged adultery was given.

GORELL BARNES J. An official from the India Office has usually attended in these cases.

*Inderwick, Q.C.* (*Lacey Smith* with him), for the petitioner, referred to the case of *The Queen's Proctor* v. *Fry* (1), in which copies of registers of baptisms in India, transmitted to the India Office and deposited there, were received by Sir James Hannen as evidence on an issue of legitimacy, on the ground that they were public documents of the same class as similar records of Indian marriages, which had been held admissible by the full Court in *Ratcliffe* v. *Ratcliffe and Anderson*. (2) He

(1) (1879) 4 P. D. 230.

(2) (1859) 1 Sw. & Tr. 467. In giving the judgment of the Court in *Ratcliffe* v. *Ratcliffe and Anderson*, 1 Sw. & Tr. 467, in which the parties were married in 1844, Lord Campbell C.J. said: "The next objection made on behalf of the respondent was that the petitioner had not given sufficient evidence of the celebration of his marriage; and this depends upon the admissibility of the entry in the

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stated that an official from the India Office was present, and could be called, if necessary.

*Priestley*, for the respondent.

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book produced before us from the archives of the East India Company. The clerk who produced this book said, 'It is the return of marriages celebrated in India made under the authority of the East India Company,' from which I understand that the original register in India and the authenticated copy transmitted to the secretary of the company in London, were made under the authority of the company. . . . ."

"Books kept among the archives of the East India Company professing to contain authenticated copies of registers of marriages celebrated in India, may be considered as duplicate originals, and they seem clearly to come within the description of public documents above described. Accordingly they have been admitted in the House of Lords as evidence of the celebration of marriage in peerage cases and in divorce cases, in which the Lords profess to be guided by the rules of evidence observed in the Courts of Common Law, and the clerk who produced the book in question to us stated that he had produced similar books to the Court of Common Pleas, where they were admitted in evidence without objection."

By the Indian Marriages Act, 1851 (14 & 15 Vict. c. 40), s. 12, "Provided that with regard to these marriages so certified, *of which it may appear to the Governor-General in Council desirable that evidence shall be transmitted to England*, the Secretary to the Government, or such other officer as aforesaid, shall, at the end of every three calendar months in each year, send all the certificates sent to him as aforesaid during such three months signed by him, to the Secretary of the East India Company, for the purpose of being delivered to the Registrar-General of Births and Marriages in England."

By s. 22, "The certificates which shall be delivered to the Registrar-General of Births, Deaths and Marriages in England, under this Act, or under any laws or regulations to be made thereunder, shall be kept in the General Register Office, in the same manner, and indexes thereof shall be made and searches permitted, and copies thereof, sealed or stamped with the seal of the General Register Office, shall be given in like manner as by the Act of the Session holden in the 6th and 7th year of King William IV., chapter 86, is provided concerning the certified copies (kept in such office under such Act) of the Register of Births, Deaths and Marriages in England; and every certified copy, purporting to be sealed or stamped with the seal of the said General Register Office, of any such certificate delivered to the Registrar-General under this Act, or under such rules and regulations, shall be received as evidence of the marriage to which the same relates, without further proof of such certificate or of any entry therein."

By the Indian Act XV. of 1872 (the Indian Christian Marriage Act, 1872), the Indian Marriages Act, 1851 (14 & 15 Vict. c. 40), is repealed; and by s. 80, "Every certified copy, purporting to be signed by the person entrusted under this Act with the custody of any marriage register or certificate or duplicate required to be

GORELL BARNES J. I think that the proof of the marriage having taken place is satisfactory, and I grant a decree of judicial separation.

Solicitor: *Woodham Smith.*

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kept or delivered under this Act, of any entry of a marriage in such register or of any such certificate or duplicate, shall be received as evidence of the marriage purporting to be entered, or of the facts purporting to be so certified therein, without further proof of such register, certificate, or duplicate, or of any entry therein, respectively or of such copy."

By s. 81, "The Secretary to the Local Government and the officers appointed under s. 56 (the Marriage Registrars) shall, at the end of every quarter in each year, select from the certificates of marriages forwarded to them respectively during such quarter, *the certificates of the marriages of which the Governor-General in Council may desire that evidence shall be transmitted to England*, and shall send the same certificates signed by them respectively to the Secretary of the Government of India in the Home Department, for the purpose of being forwarded to the Secretary of State for India, and delivered to the Registrar-General of Births, Deaths and Marriages: Provided that in the case of the Governments of Madras and Bombay the said certificates shall be forwarded by such Governments respectively directly to the Secretary of State for India."

By the Births' and Deaths' Registration Act, 1836 (6 & 7 Will. 4, c. 86), s. 38, "All certified copies of entries purporting to be sealed or stamped with the seal of the said register office shall be received as evidence of the birth, death, or marriage to which the same relates, without any further or other proof of such entry."

The following is an extract from a document styled "Registers and Records of which the originals or certified copies are deposited in the custody of the Registrar-General, General Register Office, Somerset House":—

"India.—Registers of Marriages in India solemnized since 1st January, 1852, in the presence of Registrars and Licensed Ministers (14 & 15 Vict. cap. 40, and Indian Act, No. 15 of 1872).

"*These Registers refer to such marriages as the Governor-General in Council considers desirable that evidence thereof should be transmitted to England.*

"*Marriages solemnized by clergymen of the Church of England are not included in these Returns, Certificates of Baptisms, Burials, and Marriages of all European British subjects in India, dating from* 1698, *can be obtained at the India Office.*"

H. D. W.

1899
*Feb.* 27.

## In the Goods of BOLTON.

*Administration—Limited Administration—Grant Ad Colligendum—Next of Kin Abroad—Necessity for the immediate Sale of a Business.*

Where the keeper of a small shop in London died apparently a bachelor and intestate, and his next of kin who lived in South America had been communicated with but had not yet answered, and it was necessary to sell the goodwill at once, the Court made a grant ad colligendum to a friend, whom the deceased had shortly before his death asked to manage his affairs, in the form adopted in *In the Goods of Schwerdtfeger*, (1876) 1 P. D. 424.

William Edward Bolton, who had formerly lived in Brazil, and who had since September, 1898, carried on a small business as a newsagent, tobacconist, and stationer in Battersea Rise, died in January, 1899, leaving an estate consisting of this business, for which he had given 140*l.*, clothes and jewellery worth 25*l.*, and a cheque drawn to bearer for 100*l.*

He was believed to be a bachelor, and to have died intestate.

He had no relations in England. His next of kin was believed to be an uncle living at Monte Video, who had been communicated with, but from whom no instructions could be received in less than two months. It was stated that the business, if sold at once, would be worth 100*l.*, but that, if the shop were once closed, it would become practically valueless.

William Thomas Taylor, in whose house the deceased had lived, applied either for a general grant for the use and benefit of the next of kin, or for a grant ad colligendum. He was a creditor of the estate for about 20*l.* The funeral expenses had been paid out of the proceeds of the cheque.

The affidavit of the applicant was supported by affidavits made by his solicitor and a friend of the deceased. It appeared that before his death the deceased had asked the applicant to manage his affairs.

*Middleton*, in support of the application, referred to *In the*

*Goods of Schwerdtfeger* (1), *In the Goods of Anne Ashley* (2), and *In the Goods of Suarez.* (3)

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BOLTON, IN THE GOODS OF.

GORELL BARNES J. I think a grant ad colligendum may be made in the form adopted in *In the Goods of Schwerdtfeger.* (1) There must be justifying security.

Solicitor: *Harold Fawssett.*

H. D. W.

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## IN THE GOODS OF QUICK. QUICK *v.* QUICK AND ANOTHER.

1899
*Feb.* 27.

*Will—Administration—Citation and Non-appearance of Alleged Legatees—Practice.*

In an action brought to set aside an alleged will, the Court, on proof of the citation and non-appearance of the alleged legatees, made a grant of administration to the next of kin of the deceased.

*Morton* v. *Thorpe,* (1863) 3 Sw. & Tr. 179, followed.

THE plaintiff George Quick in his statement of claim alleged that he was the son and one of the next of kin of John Quick, late of Upper Spring Street, Portman Square, who had died on May 20, 1895, and claimed to have an alleged will of such person dated April 3, 1880, pronounced against, a declaration of his own legitimacy and a grant of administration.

The defendants were Andrew J. Quick, Charlotte Taylor and Charles Turner, who had entered a caveat against administration being granted to the plaintiff, and the St. Luke's Hospital, the Roosevelt Hospital and the Five Points House of Industry at New York, the legatees under the alleged will, which had been made at New York at a time when it was contended that the testator was insane. These institutions did not appear. The first-named defendants claimed to have the will pronounced against, and that the Court should pronounce that the plaintiff was not and that they were next of kin and entitled to administration.

(1) 1 P. D. 424. (2) (1890) 15 P. D. 120.
(3) [1897] P. 82.

1899

QUICK, IN THE GOODS OF. QUICK v. QUICK.

*Priestley*, for the defendants, stated that the parties had agreed to a stay of proceedings upon the terms that "the defendant Andrew J. Quick should apply to the Court for an order directing a grant of letters to him as under an intestacy, on the ground that all persons interested under the will have been served with the writ, and have declined to prove the alleged will. The plaintiff hereby admits that he is unable to prove that he is the lawful son and only next of kin of the deceased, and admits that Andrew J. Quick is next of kin being a lawful brother of the deceased, and that he together with Charlotte Taylor and Charles Turner are entitled in distribution to the estate of the deceased under an intestacy."

*Barnard*, for the plaintiff, agreed.

*Theobald Mathew*, for creditors of the estate.

GORELL BARNES J. Letters of administration will be granted to the defendant Andrew J. Quick, on proof that he is the next of kin of the deceased. The creditors should have their proper costs. (1)

Solicitors: *Brighten & Lemon; S. H. Peddar; A. R. & H. Steele.*

(1) "The Court will grant administration to the next of kin, notwithstanding that it is suggested that de facto there is a will, if the executor and persons interested therein have been cited to propound such will and have not appeared to the citation": Coote and Tristram's Probate Practice, 11th edition, 1891, p. 58.

H. D. W.

## In the Goods of JOHN CALLICOTT (otherwise WILLIAM SMITH).

1899
*April* 17.

*Probate—Practice—Administration—Intestacy—Oath of Administrator—Next of Kin—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Citation dispensed with—Sureties—Justification.*

The intestate died in 1898. His son, who, if alive, would be entitled to administration as sole next of kin, had married and left this country in 1872, and had not been heard of since. The intestate's estate amounted to about 200*l.* The Court allowed a grandson of the intestate (the issue of a deceased daughter) to take a grant of administration, under s. 73, without requiring the missing next of kin to be cited by advertisements; the applicant to swear that he believed himself to be the sole next of kin, and the sureties to his bond to justify.

*In the Goods of Reed*, (1874) 29 L. T. (N.S.) 932, followed.

*In the Goods of Shoosmith*, [1894] P. 23, distinguished.

This was a motion for a grant of administration, under s. 73, to William James Chorlton, a grandson of the intestate, without citing the next of kin, a son of the deceased, who disappeared in 1872.

John Callicott, commonly known as William Smith, of 23, Victoria Avenue, Mundee, Newport, in the county of Monmouth, died on December 12, 1898, a widower, without parent, brother or sister, and, as was believed, without child, but leaving William James Chorlton, a grandchild, who was believed to be his only next of kin, him surviving.

The deceased had three children, two of whom predeceased him without leaving issue. The third, William Callicott, left England in the year 1872 with his wife, and had never since been heard of, although every effort was said to have been used by the mother, prior to her death in 1887, to ascertain what had become of him.

*Newson*, for the applicant. The estate is about 200*l.*, and the applicant is entitled to at least one-half, in any event. Sect. 73 enables the Court to pass over the person who would have the prior right to administer the estate. *In the Goods of*

1899

CALLICOTT, IN THE GOODS OF.

*Shoosmith* (1) is an authority for doing so, without requiring citation by advertisement, the expense and delay of which would be considerable. This is not a question of law, but of practice.

[THE PRESIDENT. The law is very careful that the proper person should be appointed administrator. You are advocating a change in the practice, which is the law of this Court. Can you give me any other authority for doing this? The case you have cited was that of a husband who had deserted his wife. Here, it is a son, whom you ask me to pass over. Unless you can give me some direct authority, I think you must follow the ordinary practice and advertise.]

In an earlier case, *In the Goods of Reed* (2), Sir James Hannen allowed the applicant, who was the intestate's mother, to take the grant, she swearing that she believed herself to be the sole next of kin. This is a somewhat stronger case than that, in point of time, the intestate's father, who was passed over, having disappeared twenty-two years before.

THE PRESIDENT. I think I see my way to grant this application. In face of the established practice I could not accede to the argument without some direct authority; but the case of *In the Goods of Reed* (2), although decided a long time ago, and although it has not been followed in a way one would have thought it might have been, appears to me to be directly in point. In that case, the father of the intestate, if alive, was the sole next of kin. He had disappeared twenty-two years before, and the mother of the intestate applied for a grant. Lord (then Sir James) Hannen allowed her to take it, subject to her oath that she believed herself to be the sole next of kin. The amount of the property is not stated, and the report is silent as to advertisements, but presumably there had been none; and, at any rate, there seems to have been no citation in that case. I think, therefore, that is a precedent which I may permit myself to follow, although, in doing so, I am conscious that I am laying this Court open to be called upon to make other grants without requiring citation of the next of

(1) [1894] P. 23. (2) 29 L. T. (N.S.) 932.

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kin. In the present instance, as Mr. Newson has pointed out, the length of time which has elapsed since the disappearance of the next of kin is even greater than it was in that case. Upon the present applicant swearing that he believes himself to be the sole next of kin of the intestate, and, upon his giving justifying security, he may take the grant, under s. 73, without any advertisements.

Solicitors: *Fallows & Rider.*

H. D. G.

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## IN THE GOODS OF GEORGE DENNIS.

1899

*April* 17.

*Probate—Practice—Administration — Document Executed as a Will — Sole Executrix and Beneficiary Cited—Non-appearance—Grant to Next of Kin as upon Intestacy.*

The deceased died leaving a document, which he had duly executed as a will, giving all his property to a certain person and appointing her sole executrix.

Upon proof of personal service upon that person of a citation, calling upon her to bring in the will or to shew cause why administration, as upon intestacy, should not be granted to the applicant as next of kin, and upon an affidavit of non-appearance to the citation:

The Court, upon the authority of *Crosby* v. *Noton*, (1867) 36 L. J. (P. & M.) 55, and although there was no evidence before it as to the invalidity of the will, made a grant to the applicant, as upon an intestacy, conditionally upon the applicant swearing, when taking the grant, that he was the next of kin of the deceased.

MOTION FOR ADMINISTRATION.

The deceased, George Dennis, died on November 15, 1898, aged eighty-four, a widower, without issue or parent. For some years before his death, he had been infirm in health and under the care of a nurse.

On January 8, 1898, he executed, in the presence of two witnesses, a document purporting to be his will, whereby he bequeathed everything he possessed to his nurse, and appointed her sole executrix.

On February 9, 1899, an agreement of compromise was

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entered into between the executrix on the one hand and members of the deceased's family on the other.

On February 24, 1899, a citation was issued, at the instance of the next of kin, calling upon the executrix and sole beneficiary under the will to bring into the Registry and prove the same, or to shew cause why a grant of letters of administration, as upon an intestacy, should not be made to the applicant, who thereby also gave formal notice of his intention to move for a grant.

*Priestley*, for the applicant, Mr. John Dennis, moved the Court, and relied upon *Crosby* v. *Noton*. (1) If the application were acceded to, Mr. Dennis would swear that he was the next of kin when obtaining the grant.

THE PRESIDENT, upon this understanding, and following the authority cited, made the grant to the applicant.

Solicitors: *Ravenscroft, Woodward & Hill.*

(1) 36 L. J. (P. & M.) 55.

H. D. G.

## In the Goods of THOMAS COOPER.

1899
*May* 1.

*Probate—Will—Appointment of Executors—Executor Described by Wrong Surname.*

The deceased, by his will, appointed certain executors, of whom one was described as "the said Thomas Cooper." The deceased had no friend, child, or relative named Thomas Cooper, but he had a friend named Thomas Stevenson, who was named in the will as a trustee along with the other two persons properly named as executors.

The Court ordered the surname "Cooper" to be struck out of the engrossment of the will to be made for the purposes of probate, and granted probate to Thomas Stevenson and the other two executors.

Motion for Probate.

Thomas Cooper died on February 23, 1899, leaving a will dated February 15, 1899, whereby he bequeathed all his estate and effects whatsoever and wheresoever to his wife Mary Cooper, his friend Thomas Stevenson, and his son William Cooper, their heirs, executors, and administrators, upon certain trusts for the benefit of the testator's widow and children, and with authority to the said Mary Cooper, Thomas Stevenson, and William Cooper to carry on the testator's business of a brick-maker during the minority of any child of the testator or during the lifetime of the said Mary Cooper; and the trustees were empowered to employ and pay William Cooper as manager and to remunerate Thomas Stevenson for his loss of time and personal services in assisting to carry on the said business. The clause appointing executors was in these words: "I appoint my said wife, the said Thomas Cooper, and my said son, William Cooper, executors of this my will."

From the affidavits filed upon the motion, it appeared that the word "Cooper" after the word "Thomas" was a draftsman's error, and that the testator had no friend, child, or relative named Thomas Cooper.

*J. A. Compston* moved that probate be directed to issue with the name "Stevenson" substituted for the name "Cooper" after the word "Thomas" in the clause appointing executors,

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or, in the alternative, that the name "Cooper" be omitted therefrom, and, in either event, that probate should issue to Thomas Stevenson as one of the executors, jointly with the other two persons properly named. He cited *In the Goods of De Rosaz* (1), where the applicant's name appeared in the original will as "Percival ———," among the persons named as executors. In the present case, the name of the applicant, Thomas Stevenson, appears twice in the will in conjunction with the names of the other two persons who are rightly named as executors. Upon the face of the will itself, it is, therefore, clear that "Cooper" was a draftsman's error for "Stevenson." It is important that he should have probate, as there is a business and real estate to be looked after. Upon the authority of the case cited, the Court should not merely strike out the wrong surname, but should insert the right one.

THE PRESIDENT. I cannot go so far as that. I will strike out the name "Cooper," so that, in the exemplification for probate, the name will appear as "Thomas ———"; and, upon the authority of the case of *In the Goods of De Rosaz* (1), I grant probate to the applicant, who will be identified in the probate as "Thomas Stevenson, in the will described as Thomas ———."

Solicitor: *George Trenam.*

(1) (1877) 2 P. D. 66.

H. D. G.

## EVANS *v.* EVANS AND PLATTS.

1899
*April* 25, 26.

*Divorce—Measure of Damages—Husband and Wife Living Apart—Separation Caused by Wife—Subsequent Adultery.*

Upon a husband's petition for dissolution of marriage claiming damages, it appeared that the husband and wife separated after a cohabitation of only a few months on account of the wife's overbearing and insulting conduct and language towards her husband, culminating in actual violence to him on more than one occasion.

It was proved, and not denied, that, rather more than a year after the separation, the co-respondent, who had been acting as her solicitor, committed adultery with the respondent, and that this improper intimacy continued for about twelve months :—

*Held*, that, notwithstanding the separation and the fact that it had been caused by the violent conduct of the respondent towards the petitioner, the latter was entitled to some damages; that the fact of the co-respondent's frequent adultery having rendered reconciliation absolutely out of the question was a material element for consideration in fixing damages; and, that the jury were entitled to consider also, and to decide as a matter to be inferred from all the circumstances of the case, whether the respondent and co-respondent had not misconducted themselves together at a time anterior to the date proved by affirmative evidence and admitted and alleged by the co-respondent as the first date when adultery took place between himself and the respondent.

*Weedon* v. *Timbrell*, (1793) 5 T. R. 357, and; *Malcomson* v. *Givins*, *The Times*, Feb. 27, 1873, considered.

THIS was the petition of the husband, praying for the dissolution of his marriage and claiming damages against the co-respondent.

The parties were married on February 2, 1895, and never lived together after the middle of October, 1895. The petitioner was about twenty-four and the respondent twenty-one years of age at the time of the marriage. A child was born in May, 1896.

Trouble arose soon after the marriage and culminated early in the month of October, when the respondent, in the presence of guests, refused to allow her husband to sit down at the dinner table, and afterwards followed him upstairs and violently snatched from him his watch and chain and scarf-pin, and scratched his face and hands and endeavoured to provoke him

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to strike her. Subsequently, on the 13th of the same month, the respondent again assaulted the petitioner, and kicked him violently in the stomach, and afterwards put her back against the front door and refused to allow him to leave the house, and kicked him. She then went upstairs and threw things belonging to him out of the window into the garden, and, on the petitioner returning to the house later in the evening, she barred the door in his face and refused to let him enter the house.

In 1896 the wife petitioned the Court for restitution of conjugal rights, in answer to which the husband set up the foregoing and other acts, and counter-claimed a judicial separation. The suit was not proceeded with, and the wife paid the costs of her husband.

In the autumn of 1898 the respondent and co-respondent seem to have quarrelled, and the respondent sent to the petitioner's father a number of letters she had received from the co-respondent, and subsequently made to the petitioner a confession of her adultery with the co-respondent, which corroborated evidence which the petitioner had obtained. Thereupon this petition was filed, alleging adultery on March 2 and April 26 and 27, 1898, at a certain hotel in London, and at other times and places.

The respondent filed no answer. The co-respondent put a simple denial upon the record, but, in Court, he admitted that he had committed adultery, though he said that the first occasion was in November, 1897.

*Inderwick*, *Q.C.*, and *R. H. Pritchard*, appeared for the petitioner.

*R. J. Willis*, for the respondent.

*Bargrave Deane*, *Q.C.*, and *Willock*, for the co-respondent, submitted that there was no case as to damages to go to the jury. Lord Hannen held that a claim for damages was founded on the loss of consortium, and he dismissed such a claim where the husband and wife had been living apart: *Malcomson* v. *Givins*. (1) That case appears to have been decided on the

(1) *The Times*, Feb. 27, 1873.

authority of two old cases—*Weedon* v. *Timbrell* (1) and *Winter* v. *Henn* (2)—the former of which was distinguished by Lord Ellenborough in *Chambers* v. *Caulfield*. (3) The wife treated her husband very badly, turned him out of their house, and refused to let him in again. There is no evidence of adultery prior to the separation. The injury to this husband would be compensated by the smallest possible amount: *Izard* v. *Izard and Leslie*. (4) The husband should look to his wife for any damages he may have suffered. The Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 45, gives the Court power, after decree, to order the guilty wife, who has means, to pay to the innocent husband a sum of money out of her separate estate.

[THE PRESIDENT. The Court cannot exercise that power either to punish the wife or compensate the husband for the wrong he has suffered. It is merely to put the husband as nearly as may be in the same position as he was in before, in regard to the keeping up of the home. That can hardly be called compensation.]

*Inderwick, Q.C.*, in reply. The petitioner is entitled to substantial damages. There is no evidence that the respondent ever went wrong with any man before she committed herself with the co-respondent, who was acting as her solicitor. They practically lived together for about twelve months, and it is the action of the co-respondent which has rendered a reconciliation absolutely impossible. In olden times, it was said that nothing short of assent by the husband to the adultery was an answer to an action for crim. con. This was, in course of time, modified to the extent of considering the husband's conduct, short of actual assent by him to his wife's misconduct. But, at all times, the matter which the Courts have considered in such cases has been the husband's conduct and whether he has in any way brought about the adultery of which he complains. Nothing whatever can be said against the petitioner in the present case. The suggestion that he is to look to the lady's fortune for compensation for the injury he has sustained

(1) 5 T. R. 357.
(2) (1831) 4 C. & P. 494.
(3) (1805) 6 East, 244.
(4) (1889) 14 P. D. 45, at p. 47 (judgment of Butt J.).

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is ridiculous, especially coming, as it does, from counsel for the co-respondent.

The co-respondent having been called, the learned President proceeded to sum up the case to the jury.

The other material facts appear in the summing-up.

THE PRESIDENT. The only question you have to consider is the amount of damages. I have no doubt about finding the issue of adultery with regard to the respondent, and you will have no doubt about it in regard to the co-respondent, the issue as to which is for you. In my view, it is equally beyond question that some damages should be awarded. I was asked by the co-respondent's counsel to say that this is not a case for any damages. It cannot be denied that there have been thrown out, at different times and in various cases, suggestions tending to shew that where a husband and wife have become separated, the husband cannot afterwards claim damages. That is not, however, the law. And that is not the law I am going to lay down to you. No doubt the fact of a separation having taken place is an element, but it is only one among several elements, to be considered. What, then, are the grounds to be taken into consideration in assessing damages? One main ground is the breaking up of the home. If you think that the separation took place before any adultery was committed and was not caused in any way by the wrongful act of the co-respondent, it is quite right to take that into account as a very important element operating in diminution of the damages. But I think that the authorities have been misunderstood, when it is argued that the mere separation of the husband and wife constitute an answer to a claim for damages. The breaking up of the matrimonial home is not by any means the only element, nor has it been considered by some authorities as even the chief element, to be considered in such cases as this. A man is wronged, by the seduction of his wife, far beyond the loss which he sustains by the breaking up of his home, however important an element of damage this may be. It is a matter for consideration, whether a man, whose wife has been seduced by

another man, has not been subjected to intolerable insult and wrong; and the fact that he has already parted from his wife at the time when the adultery was committed does not render the blow to his honour less acute—does not render the position of his child or children less serious. That appears to me to be the law, and it is from that point of view that you ought to approach the consideration of this case. There are, then, one or two material points for you to take into account, in arriving at a conclusion upon the facts here presented to you. In the first place, you should ask yourselves how far has the co-respondent been the cause of the misfortune that has befallen the petitioner. The co-respondent puts the date of the first act of misconduct between himself and Mrs. Evans at a time in 1897, somewhat after the separation of the husband and wife and after she had endeavoured to obtain a decree in a suit by her for restitution of conjugal rights, which had been answered by the husband saying that he had substantial cause of complaint against her. If you find it to be true that Mr. Platts never seduced the affections of the wife until after the separation and after the suit for restitution of conjugal rights, then it would be unjust to hold him guilty of causing the estrangement and separation. That depends upon this: at what time, do you think—and the question is one of inference from the whole facts of the case—did Platts get hold of this woman? He is compelled to own his fault, and wishes to put the seduction at as late a date as possible. He knows, as a man and a solicitor, that this is most important. But you are not bound to accept his statement. You are entitled to act on your own view of all the facts of the case, as you find them; and it is for you to consider, whether the seduction did not take place at an earlier date than he has stated. You will remember that, in cross-examination, he admitted that he had not merely been introduced to the respondent at a ball, but that, after the introduction and before her marriage, she had visited at the house where he and his wife were then living. Consider, in the next place, what happened after that. It is quite clear that, at some time before the petitioner and respondent parted, the feelings of the latter had become estranged from her husband, and her

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behaviour towards him was very violent and bad. We have heard, moreover, that at the time of the marriage, she had some 12,000*l.*, and it was thought a good thing that she should advance a sum of 1000*l.* to extend the business of the petitioner's father and to enable the petitioner to become a partner in that business. It was a very natural and proper arrangement, and a good arrangement for all the parties to it. But this does not seem to have been her view shortly afterwards, or the view of some person or persons who apparently advised her; for she brought an action against her father-in-law and her husband, and in that action she charged them with fraud. The end of it was that this charge was withdrawn, and the money, or the greater part of it, was paid back. You will hardly doubt that the relations between husband and wife were extremely strained, and the wife's subsequent conduct towards her husband was most violent and domineering, and her language very intemperate. I suppose her head had been completely turned by this money which she possessed. She instituted the proceedings for restitution of conjugal rights, and, not being in a position to reply to her husband's answer in that suit, setting up her violence and outrageous conduct towards himself, she was obliged to abandon that suit and to pay his costs. Her affections must have become completely estranged from her husband by that time. What was the cause of this? If she had transferred her affections to some one else, that would be a sufficient cause; and, in that case, a woman of violent temper might be led to act in the outrageous way in which the respondent appears to have acted. Do you believe Mr. Platts, when he says that he did not see anything of the respondent, except casually, until September, 1897? We know that she went, shortly after her marriage, to Blackburn or Blackpool, where Mr. Platts lived. We know that she transacted business with a man who had been a clerk in the office of Mr. Platts. The latter, however, stated in his evidence that he personally had nothing to do with that business. You will have to consider that statement. You may, if you see fit, draw an adverse conclusion, as a matter of inference, knowing, as you do, the state of things which undoubtedly sprang up not

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long afterwards in the matrimonial relations of the respondent with the petitioner, and which admittedly culminated in her adultery with the co-respondent in November, 1897. In view of the fact of that estrangement and of her visits to Blackburn, where the co-respondent lived, and to Blackpool, where he carried on his business of a solicitor, you will have to consider whether there had been improper relations between them at an earlier time than Platts chose to tell you. There is no doubt that the husband was under the impression that his wife's affections must have been transferred to somebody else. She endeavoured on several occasions to provoke him to strike her, saying, "Strike me, and then I shall be able to get a divorce." You will have to consider whether, when a woman begins, under such circumstances, to talk about a divorce, it is not extremely probable that she had begun to care for somebody else. The husband eventually acted on that assumption. He employed a detective, and the result was remarkable, if it was, as is suggested by the co-respondent, merely a coincidence; because, on the very first day the detective began to watch, he discovered what we now know was a guilty assignation between the respondent and co-respondent. The co-respondent himself has admitted that on that occasion adultery was committed. He says it was the first time. If so, you will probably be of opinion that it was an extraordinary coincidence. It is entirely a matter for you to consider, as a matter of inference, whether that was really the first occasion when adultery was committed; whether the husband had not suspected his wife with good reason; and, whether this was not one of a series of previous acts of adultery. If Platts was the real cause of the wife transferring her affections from her husband, then, as was held by Butt J. in *Izard* v. *Izard and Leslie* (1), he is just as much liable in damages as if no separation had taken place, he being, in fact, the cause, not only of the later adultery, but of the very estrangement and separation, which he now, through his counsel, puts forward as a reason for paying less damages or no damages at all. That is one reason. But there is another, which is urged by counsel with considerable force. It is true

(1) 14 P. D. 45.

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that the husband and wife were separated, but not finally: only by agreement; and, so little binding was the agreement considered, that the wife sought to terminate it by a suit for restitution of conjugal rights. The separation might have come to an end at any time. It is possible that, if she had seen the error of her ways, and if she had become a wiser woman, which also was possible, a reconciliation might have taken place. But Platts has rendered that reconciliation absolutely out of the question; because, although a man might be willing to take back a wife who had only erred against him by abusive language and violent conduct towards himself, it is quite another thing to take back a woman who had been living for a long time as the mistress of another man. You will, therefore, consider whether Platts, by intervening as he did, has not inflicted upon the husband substantially the same wrong as if he had been actually the cause of breaking up that home. Under all these circumstances, you will have to determine what amount the husband ought to receive as damages. I wish to offer no suggestion as to the amount, nor to guide you any more than I have done. The matter is entirely for you. It is not your duty to punish the co-respondent: this Court does not sit as a court of morality, to inflict punishment against those who offend against the social law. Consider the wrong of the adultery in all its aspects, and say by your verdict what sum you think the co-respondent ought to pay as compensation to the petitioner. One point, in conclusion, I ought to mention. Mr. Deane goes so far as to say that the husband ought to look to the wife in this case for damages or compensation. I do not think that is a matter you ought to consider at all. If it were the fact that the husband necessarily lost pecuniarily by the carrying off of the wife's fortune with her, that would add materially to the amount of the damages, but this Court has power to say that a wife shall not be allowed to retain the whole benefit of her fortune, carried off under such circumstances. She has entered into the marriage tie and made her fortune the common stock of the household, and the law undoubtedly has power to see that the wife shall not carry off and retain for her benefit the whole of what has become the

common interest—I will not say the common property—of the matrimonial home. It would, therefore, be unfair to award damages against the co-respondent for that. He is responsible for his own acts alone. He it is who has caused the injury to the husband, and for that he ought to pay. But it is not because the law takes care that the wife shall not deprive her husband of all share in her own property that the damages ought to be less, although I certainly do not think they ought on that account to be more. You will, therefore, act wisely in putting that matter altogether out of view, the question for you being, as I have before stated: What damages ought Platts to pay as compensation for the injury done by him to the husband by the seduction of his wife?

In the result, the jury found that the co-respondent had committed adultery with the respondent, and assessed the damages at 500*l*.

THE PRESIDENT pronounced a decree nisi, with costs against the co-respondent, and ordered the damages to be paid into Court within fourteen days.

Solicitors for petitioner: *Pritchard & Co.*
Solicitor for respondent: *T. M. Richards.*
Solicitor for co-respondent: *H. A. Sims.*

H. D. G.

C. A.
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*May* 10.

[IN THE COURT OF APPEAL.]

## LOWE *v.* LOWE.

*Divorce—Wife's Petition—Husband's Answer—Counter-charge of Adultery—Cross-petition—Intervention—Third Party, Application by—Jurisdiction—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 2—*Appeal to House of Lords—Supreme Court of Judicature Act*, 1881 (44 & 45 *Vict. c.* 68), *s.* 9.

Where a husband in his answer to his wife's petition made a counter-charge against her of adultery with a person named, but did not ask for any relief whatever beyond the simple dismissal of the petition:—

*Held*, by the Court of Appeal, affirming Jeune J., that under the circumstances the answer could not be treated as a cross-petition under s. 2 of the Matrimonial Causes Act, 1866, but merely as an ordinary defence, and that therefore the Court had no jurisdiction, on the opposition of the husband, to allow the alleged adulterer to intervene.

*Harrop* v. *Harrop*, ante, p. 61, followed.

Application under s. 9 of the Supreme Court of Judicature Act, 1881, for leave to appeal to the House of Lords refused.

THIS was a petition by a wife for dissolution of her marriage on the ground of her husband's alleged cruelty and adultery. The husband in his answer denied the allegations, and charged the wife with adultery with a gentleman named, a married man, but did not ask for any relief beyond the dismissal of the petition, the answer praying simply "that your Lordship will be pleased to dismiss the said petition," and there being no claim for "further and other relief." The wife delivered a reply denying her alleged adultery, and the gentleman with whom she was charged with having committed adultery applied, on notice of motion served on both the petitioner and the respondent, for leave to intervene in the proceedings; but the President, Sir F. Jeune, made an order refusing the application with costs. The learned judge said he felt bound by the current of authority to hold that a third party had no right of intervention in such a case, but added that, if there was an appeal from his decision, as it was intimated there would be, he

hoped the Court of Appeal could see its way to allowing a person charged as in the present case to intervene for the purpose of clearing his character.

The applicant appealed from the President's order.

*Carson, Q.C.*, and *Barnard*, for the appellant. If this had been a cross-petition by the husband before the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), s. 2 of which now enables an answer to be treated as a cross-petition, the appellant would have had the right to intervene and be made a co-respondent. Reading that section and s. 28 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), together, it will appear that the appellant has a right to come in and intervene with a view to defending himself. (1)

If this had been the husband's petition it would have been his duty to make the appellant a party. Before the Act of 1866, the husband could only have obtained relief against his wife by presenting a cross-petition, and in such a case as this the person charged with adultery would have been made a respondent. Sect. 2 of the Act of 1866 having created a new right of relief, by making the answer equivalent to a cross-petition, gives to this answer all the incidents of a cross-petition. Under that section, if the respondent, the husband, "shall oppose the relief sought" the Court may give him "on his application" the same relief as if he had filed a cross-petition. So that he has the right, without filing any cross-petition at all,

(1) By s. 28 of the Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), "Upon any such petition presented by a husband the petitioner shall make the alleged adulterer a co-respondent to the said petition, unless on special grounds, to be allowed by the Court, he shall be excused from so doing; and on every petition presented by a wife for dissolution of marriage the Court, if it see fit, may direct that the person with whom the husband is alleged to have committed adultery be made a respondent. . . . ." By s. 2 of the Matrimonial Causes Act, 1866 (29 & 30 Vict. c. 32), "In any suit instituted for dissolution of marriage, if the respondent shall oppose the relief sought on the ground, in case of such a suit instituted by a husband, of his adultery, cruelty, or desertion, or in case of such a suit instituted by a wife, on the ground of her adultery or cruelty, the Court may in such suit give to the respondent, on his or her application, the same relief to which he or she would have been entitled in case he or she had filed a petition seeking such relief."

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to make an application. In *Wheeler* v. *Wheeler and Rhodes* (1) the Court allowed the person with whom, on the wife's petition, the husband charged his wife with having committed adultery, to intervene. The object of both the Acts was that every person charged with adultery should have the right to come in and defend. Under the practice of the old Ecclesiastical Courts a person in the position of this appellant would have been allowed to intervene. The practice is thus stated in Shelford on Marriage, p. 569: "In the Ecclesiastical Courts a third person, not originally a party to the suit or proceeding, but claiming an interest in the subject-matter, may interpose in defence of his own interest in every case in which it is affected either in regard of his property or person. This proceeding is termed an *intervention* and is unknown in our courts of law and equity." It is true that the only reported cases upon that practice are those of nullity and probate suits, but Shelford's statement of the practice, which has never been disputed, is wide enough to cover such cases as the present. In the recent case of *Harrop* v. *Harrop* (2), where the husband made a counter-charge to his wife's petition charging her with adultery, without claiming cross relief, Gorell Barnes J. held that the Court had no power to allow the alleged adulterer to intervene; but it is important to notice that Shelford's statement of the practice was not called to his attention. That old practice is still preserved to the Divorce Court by s. 22 of the Act of 1857, which provides that in all suits and proceedings, other than proceedings to dissolve any marriage, the Court shall proceed and act and give relief on the principles and rules which in the opinion of the Court shall be, as nearly as may be, conformable to those on which the Ecclesiastical Courts formerly acted and gave relief. Therefore, if the Court cannot give relief under the Act of 1866, it can do so under the old practice. The one case in which it is clear that intervention is not allowed is that of a person charged with adultery by the Queen's Proctor. There the person charged is not allowed to intervene: *Grieve* v. *Grieve*. (3)

(1) (1889) 14 P. D. 154. (2) Ante, p. 61.
(3) [1893] P. 288.

*Inderwick*, *Q.C.*, and *Willock*, for the respondent, the husband. Under s. 22 of the Act of 1857 the old practice of the Ecclesiastical Courts is binding on the Divorce Court in probate and nullity cases only, not in cases of divorce. There is no such rule as is stated by Shelford that in all cases a third party is allowed to intervene, and his statement of the practice is not borne out by the cases he cites: for instance, *Chichester* v. *Donegal* (1) was a nullity case, affecting personal status; and *Dalrymple* v. *Dalrymple* (2) was a case of restitution of conjugal rights, affecting pecuniary interests. There is no reported case in which, under the practice of the old Ecclesiastical Courts, a person charged with adultery was made a party to the suit, either on his own application or on the application of the parties. As illustrated by the above cases cited by Shelford, third parties were only admitted in cases in which they had a pecuniary interest, such as under a will; or in legitimacy cases, where children were allowed to intervene; or in cases of nullity of marriage, where third parties were allowed to intervene to protect their personal status which might be affected by the litigation. This distinction in the practice is not pointed out by Shelford, for it is clear his mind was not directed to the particular point now under consideration. There is no doubt that, in cases of intervention by the Queen's Proctor, no person accused who is not already a party can be allowed to make himself one and intervene. Sect. 2 of the Act of 1866 is not intended for the protection of persons in the position of this appellant at all. There are only two instances under that section and under s. 28 of the Act of 1857 in which third parties are entitled to come into a divorce suit: (1.) where the husband charges the wife with adultery; there the person charged with having committed adultery with her not only may but must be made a party; (2.) where the wife charges the husband with adultery; there the woman charged may be allowed to intervene. It is not fair to the husband that as respondent he should be forced to bring in a third party and be saddled with the costs of two sets of counsel. In *Harrop* v. *Harrop* (3),

(1) (1822) 1 Add. 5, 16. (2) (1811) 2 Hagg. Cons. 54, 59.
(3) Ante, p. 61.

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which is precisely the same case as this, Gorell Barnes J. followed the correct practice, pointing out that in *Wheeler* v. *Wheeler and Rhodes* (1) the husband by his answer prayed not simply for the dismissal of his wife's petition, but "for further or other relief," thus making the answer in effect a cross-petition.

*Barnard*, in reply. With regard to the cases of intervention by the Queen's Proctor, he cannot intervene before decree. This appellant desires to intervene before decree and before the trial, in order to protect his own honour. It is a manifest injustice that a charge should be made against a man, in open Court and in the publicity of the present day, without his having an opportunity of being heard in his own defence.

LINDLEY M.R. I do not think we shall gain anything by postponing judgment, as we have considered the sections and arguments carefully, and we cannot disturb the judgment appealed against. The present state of things has grown up out of the practice of the old Ecclesiastical Courts in cases of divorce. The inquiry in such cases was comparatively private. There was no jury, no viva voce examination and cross-examination. The inquiry was into the conduct of the husband or wife, and other people never heard anything about the matter. Now all that is altered: everything is in public; and most grievous injustice is done to a person whose conduct is being investigated under the publicity of modern times, where he is not able to say a word in his defence. That, however, is a question for the Legislature, not for us.

Turning to the Act of Parliament, s. 2 of the Matrimonial Causes Act, 1866, relieves the husband or wife against whom a petition has been presented from the necessity of presenting a cross-petition. Under the old practice a husband could put in a defence against his wife's petition, but could not, without a cross-petition, obtain any relief against her. It was felt that it would simplify matters if his defence were treated as a cross-petition, and the object of the section was to provide for that. It was done in this way. [The learned judge read the section,

(1) 14 P. D. 154.

and continued :—] Now, what does that mean? The section says, "if the respondent shall oppose." How? In the proper way, namely, by putting in a defence. Then it says, "on his or her application." When is that to be made? The statute does not say; but the construction which has always been put upon it by the Divorce Court is, that the application should be made before the trial: and the practice is to make the application when the defence is put in, and with it. If a husband when he puts in his defence asks the Court to treat it as a cross-petition, it will be so treated, but if he does not, and says nothing at all about it, it is treated as an ordinary defence, and he cannot ask for it to be treated otherwise. I do not mean to say that the Court could not give leave to amend, but I cannot conceive that the Court would listen to an application for leave to amend after the trial. That could not have been intended: it would be opposed to all principles of justice. The Court could, before trial, give leave to amend up to the last moment. The practice has always been to treat the defence simply as a defence unless it is so worded as to shew that the husband wished it to be treated as something more, or unless and until it is amended. If we were to accede to the argument on behalf of the appellant we should be depriving the husband of the right to defend himself unless he asked for a decree against his wife. He need not ask for any relief at all. Why should the Court force his hand and say he must? In my opinion it has no right to do so. It comes, therefore, to this, that if a husband puts in a defence and does not ask by that defence for any relief further than the dismissal of the petition, he is at liberty to confine himself to that, and no one can force him to do more, so that the intervention of a third party will not be allowed. But if, on the other hand, as in the case before Butt J. of *Wheeler* v. *Wheeler and Rhodes* (1), he draws his defence in such a way that it can be fairly construed as asking for some relief further than the dismissal of the petition, the intervention of a third party can be allowed.

The authorities that have been referred to are in favour of this view, and notwithstanding the ambiguous expressions in

(1) 14 P. D. 154.

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Shelford on Marriage which have been alluded to, I prefer to follow the recent decisions, including that of Gorell Barnes J. in *Harrop* v. *Harrop*. (1) I think the President was right, and that the appeal must be dismissed with costs.

RIGBY and COLLINS L.JJ. concurred.

*Appeal dismissed.*

*Barnard* applied under s. 9 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), for leave to appeal to the House of Lords.

LINDLEY M.R. I do not think we ought to give you leave. To do so would throw great expense upon the other side. I do not think the House of Lords could see their way out of the difficulty, at all events in their judicial capacity.

Solicitors: *Walters, Deverell & Co.; Janson, Cobb, Pearson & Co.*

(1) Ante, p. 61.

G. I. F. C.

## MOHAN *v.* BROUGHTON.

1899
*Feb* 24;
*May* 18.

*Administration—Practice—Staying Proceedings—Laches—Knowledge of Proceedings in Chancery—Subsequent Delay—Order—Suit Dismissed.*

The plaintiff, who had been aware of, and had taken steps in, administration proceedings in the Chancery Division in the year 1894, and who also had knowledge at the time that the claim of parties in those proceedings and her own claim (if any) depended upon the legitimacy or illegitimacy of the mother of the intestate, took no steps until 1898 to prosecute her claim, as the alleged next of kin of the intestate.

On April 21, 1896, an order was made for the balance of the estate to be distributed among the persons who were found, in the Chancery proceedings, to be the next of kin, and all further proceedings therein were stayed; and on June 7, 1898, the writ in the present action was issued by the plaintiff, claiming, as next of kin of the deceased, administration to his estate.

Upon a summons to shew cause why this action should not be dismissed:—

*Held*, that although it was not necessary to determine whether the matter was res judicata, the plaintiff had practically acquiesced in the Chancery proceedings and had been guilty of such laches as to disentitle her to maintain, against those who had shared the estate under the orders in the Chancery proceedings, a suit to compel them to refund their shares; and, that as the only object of the present suit, which was, in form, to revoke letters of administration granted in 1892 and obtain a grant in her own favour, was to aid her in an attempt to recover the property which had been distributed, this Court ought not to assist her attempt to obtain a grant, which, if obtained, would be useless to her; and, accordingly,

*Held*, that the suit must be dismissed with costs.

HEARING, upon certain questions left for the decision of the Court under an order, made by consent, upon an adjourned summons to stay proceedings and dismiss the action, on the grounds of res judicata and laches.

The facts and the main points of the arguments are set out in detail in the judgment.

*Bargrave Deane, Q.C.*, and *Barnard*, for the defendant, in support of the summons.

*Bosanquet, Q.C.*, and *Calvert* (*A. T. Lawrence, Q.C.*, with them), contra.

*Cur. adv. vult.*

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May 18. GORELL BARNES J. In this case the plaintiff originally sued the late Sir Henry Delves Broughton, Bart., to obtain the revocation of letters of administration to the estate of Henry Thomas Coghlan, deceased, which were granted by this Court on December 24, 1892, to the said Sir Henry Delves Broughton, and to obtain a grant to the plaintiff of letters of administration to the said estate on the ground, as is alleged by the plaintiff, that she is the cousin and one of the next of kin of the said Henry Thomas Coghlan, and that the said Sir Henry Delves Broughton obtained the grant of the letters of administration on the untrue assertion that he was the lawful cousin and one of the next of kin of the said Henry Thomas Coghlan; whereas, as the plaintiff alleges, he was not the lawful cousin or one of the next of kin of the said Henry Thomas Coghlan. Since the hearing before me, Sir Henry Delves Broughton has died, and probate of his will has been obtained by his executors, Sir Delves Louis Broughton, Bart., and Henry Delves Broughton.

An application has since been made to me by the plaintiff for an order to continue the suit against the said executors, and an order for this purpose has been made with their consent.

Although the letters of administration granted to the late baronet have come to an end by his death, the plaintiff, as I understand, is continuing the suit in order to obtain a fresh grant to herself, on the ground that she was, and is, as she alleges, entitled thereto, and that the late baronet never had any right to obtain the grant which was made to him.

In order to appreciate the points which are submitted for decision, it is necessary to state the facts in some detail and the present position of the litigation.

The said Henry Thomas Coghlan died on November 24, 1892, a widower without issue and intestate, leaving an estate of the value of, I believe, several hundred thousand pounds.

On December 24, 1892, letters of administration were granted to the said Sir Henry Delves Broughton, as cousin of the deceased and one of his next of kin. On December 27, 1892, an originating summons was taken out by the said Sir Henry Delves Broughton in the Chancery Division against Alfred

Delves Broughton, Laura Maul, and Fanny Maria Hardresse Lawson, for the purpose of administering the estate of the deceased.

On January 23, 1893, inquiries and accounts in the said Chancery suit were directed, one of such inquiries being an inquiry as to who were the next of kin of the said deceased. On February 8, 1893, advertisements for the next of kin of the deceased were ordered, and on February 10, 1893, were duly advertised in the *London Gazette* and Irish papers. On March 10, 1893, a claim was made by Sir Anthony Crosdill Weldon, Bart., who claimed to be one of the next of kin and to exclude the plaintiff and defendants in the Chancery suit, on the ground that one Emma Broughton, who was the mother of the deceased and whom they claimed to be their aunt, was illegitimate, having, as was alleged, been born prior to the marriage of her parents, Sir Thomas Broughton and Mary Wicker.

Various other claims, besides those of the said plaintiff and defendants in the Chancery suit, were put forward on behalf of other persons to rank as next of kin of the intestate, but all claims were disallowed except those of the said plaintiff and defendants.

On November 30, 1893, the chief clerk certified that the only next of kin of the said Henry Thomas Coghlan living at his death were the said Sir Henry Delves Broughton, and the said Alfred Delves Broughton, Laura Maul, and Fanny Maria Hardresse Lawson (first cousins of the deceased), and on December 21, 1893, the chief clerk gave his certificate as to the estate and debts of the deceased's estate.

On May 18, 1894, the plaintiff in the present action took out a summons in the Chancery suit calling upon all parties concerned to attend on the hearing of an application on her part that she be at liberty to prefer a claim in the action as a first cousin of the intestate; and she supported the application by an affidavit sworn on May 31, 1894, in which she set out certain facts which she alleged shewed that she was a first cousin once removed of the said deceased, and in which she stated that about a month after the advertisements aforesaid

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had appeared her attention was directed to the matter by correspondence which appeared in the Dublin papers of March and April, 1893; and, that, although at that time she was not aware whether or not she was of kin to the deceased, about a month before making her affidavit she discovered, as she alleged, that she was of kin to him, and had since then vigorously prosecuted inquiries and searches, and was continuing her inquiries and searches. The said summons came on to be heard before the chief clerk on June 1, 1894, when the same was adjourned for a week to enable the applicant to bring in complete evidence; and on June 8, 1894, at the adjourned hearing, the chief clerk pointed out that the affidavit filed in support of the application only made out the applicant to be a first cousin once removed, and, that, as first cousins had proved their relationship, the applicant could not, even if she established her pedigree, rank in the distribution of the estate; and he made no order, but allowed the applicant six days in which to decide whether she should take her application to the judge. The applicant did not proceed further with the matter, and took no further steps in connection with the estate of the deceased until the present action. Previously to the said application by the present plaintiff in the Chancery suit—namely, on February 26, 1894—an order had been made in the Chancery suit directing the transfer and payment out of part of the distributive shares of the fund in court to the next of kin; and, later on in the same year—namely, on December 11, 1894—a further order was made that the funds in court be dealt with as directed by the schedule thereto.

The effect of these two orders was that, under the first, about three-fourths of the estate was directed to be paid to the plaintiff and defendants in the Chancery suit in equal shares, and by the latter order the remaining one-fourth of the estate was similarly apportioned. In pursuance of the order of February 26, 1894, three-fourths of the estate was immediately thereafter divided amongst the plaintiff and defendants to that suit; and immediately after the order of December 11, 1894, the remaining one-fourth was divided in the same way.

On April 21, 1896, a final order was made, directing payment

of a small balance in court to the plaintiff in the suit, and all further proceedings were stayed. On March 20, 1898, a letter was received by the late Sir Henry Delves Broughton from the solicitor to the plaintiff, giving notice of a claim by her to be entitled as next of kin of the said deceased to a grant of letters of administration to his estate as a first cousin once removed of the deceased, and on the ground that Emma Broughton, through whom the late baronet claimed relationship, was illegitimate, and that the present proceedings would be commenced. On June 7, 1898, the writ in the present action was issued. On June 30, 1898, a summons was taken out by the late baronet to shew cause why the action should not be dismissed on the ground—first, that the issue had already been adjudicated upon in the Chancery Division; and, secondly, that the action was vexatious. That summons came on for hearing before me, and was adjourned into court, and at the hearing in court it was ordered, by consent, that all questions in the action between the parties, other than the question of the relationship of the plaintiff and the late baronet to Henry Thomas Coghlan, the deceased, should be tried the next sittings before me, upon the materials already supplied to the Court and any further evidence. The case subsequently came on for hearing on these questions other than that of relationship of the plaintiff and the late baronet to the deceased, on February 24 last, when two questions were raised for the defence as a bar to the plaintiff's claim in this action. They were—first, that the plaintiff's claim was res judicata; and, secondly, that the plaintiff had been guilty of such laches as debarred her from prosecuting her claim. The contention for the defence on the first point was, that the plaintiff had come into the Chancery proceedings and became a party thereto, and was bound by the orders of the Court, directing that the property of the deceased should be divided amongst those who had been found by the chief clerk to be his next of kin. And upon the second point the contention was that, even if the plaintiff were not to be treated as a party to the Chancery proceedings, she was aware of, and had taken steps in, those proceedings, and had knowledge, at the time of the proceedings,

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that the right of the parties, found by the Court to be next of kin to the deceased, to claim to be such next of kin, depended upon the question of the legitimacy of the said Emma Broughton; and, that the plaintiff, having taken no steps, from June, 1894, until the present action, to dispute the orders in Chancery under which the estate had been distributed, had been guilty of such laches that she could not maintain a suit in Chancery to follow the estate into the hands of those who had received it; and ought not, therefore, to be allowed to maintain this suit to revoke the letters of administration for a useless purpose. The answer made by the plaintiff to the first point was that she was not a party to the proceedings in Chancery, and not formally bound by the orders in them; and, to the second point, that she had not been guilty of any laches which would debar her from maintaining the present suit and from recovering the estate if she were entitled to do so. Besides the question of the relationship of the late baronet to the said deceased, that of the plaintiff to the said deceased is in dispute, but was assumed for the purposes of the points at present to be decided. With regard to the first point, the plaintiff did not become a formal party to the administration suit, and was not formally bound by the orders made in that suit. Had the parties to that suit desired to bind the plaintiff by the proceedings in it they could have availed themselves of the powers given by Order XVI., r. 40; but advantage was not taken of that rule; and, although the question of legitimacy of the said Emma Broughton had been to some extent raised by Sir Anthony Crosdill Weldon, and although the chief clerk had certified that Sir Henry Delves Broughton and the defendants to the Chancery suit were legitimately connected with the deceased and were his first cousins, the issues so raised were not contested by the plaintiff. No doubt, the substantial reason for rejecting the plaintiff's claim to come in as a cousin was that she was only a first cousin once removed, and others had already been found to be first cousins; but I doubt whether this rejection of her claim can make the issue which she now seeks to raise strictly speaking res judicata, as between herself and any of the parties to that suit.

I do not think it necessary, however, to decide the case on this point, because, even if the plea of res judicata fail, I am of opinion, upon the second question, that the late baronet was, and the present defendants, his executors, are, entitled to succeed. The principles applicable to this question of laches, as bearing upon the present case, are to be found in the cases of *David* v. *Frowd* (1) and *Sawyer* v. *Birchmore*. (2)

In the first of these cases an intestate's estate had been distributed under a decree in an administration suit among persons found by the report to be his next of kin. Rather more than a year afterwards, notice was filed by a person claiming to be sole next of kin of the intestate against the persons among whom the estate had been distributed for the purpose of compelling the defendants to refund to the plaintiff the shares they had received. The plaintiff had had no notice of the administration proceedings, and it was held that if, on inquiry, the plaintiff established that she was sole next of kin of the intestate, the defendants were bound to refund to her the several sums they had received in the administration suit; and, that if the plaintiff established that she was one of the next of kin of the intestate, the defendants were bound to repay to her the amount of the sum which the plaintiff, in that case, should appear to be entitled to. In the second case, a suit brought by some of the next of kin or the representatives of some of the next of kin of a deceased testator against other next of kin amongst whom the residue of the testator's estate had been distributed, and against the executors, about two years after the distribution, to compel the recipients to refund, was dismissed by Lord Langdale, the Master of the Rolls. The concluding passage of his judgment is as follows: "Whether the plaintiffs have now proved that they are next of kin, has not been discussed before me; nor is it necessary; for, under the circumstances to which I have adverted, considering the knowledge which the plaintiffs had of the former proceedings, their neglect to go in and prosecute their claims, the lapse of time after distribution before the present suit was instituted, the failure of the plaintiffs to establish any case of concealment

(1) (1833) 1 My. & K. 200. (2) (1836) 1 Keen, 391, 825.

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or intimidation, or any conclusive recognition by the defendants of the validity of their claims, I am of opinion that the plaintiffs cannot sustain the suit, and I am therefore compelled to dismiss the bill; and as the defendants have nothing to do with the default, if any, which has deprived the plaintiffs of the opportunity of making out such claims, if any, as they may have been justly entitled to, I must dismiss it with costs." The decision was appealed from, and the decree for the dismissal of the bill was reversed by the Lord Chancellor, Lord Cottenham, who was of opinion, upon the evidence, that the claims of the plaintiffs were not concluded by it, but that the plaintiffs were entitled to an inquiry; and his Lordship, accordingly, directed an inquiry whether the plaintiffs were, in fact, some of the next of kin, and, if so, whether they had any notice of the suit in which the fund was distributed, with liberty to the Master to state special circumstances.

I do not gather that there was any difference between the Master of the Rolls and the Lord Chancellor as to the principles applicable to the case as above stated; but, in the report of the case, it is stated in the argument for the plaintiffs, that there was a distinct allegation in the bill that the plaintiffs were ignorant of the proceedings until after the distribution of the estate; and, although the Master of the Rolls found that the plaintiffs knew of the former proceedings, it is, I think, clear, from the terms of the very brief report of the case before the Lord Chancellor, that he was not satisfied, upon the evidence, that the plaintiffs had any notice of those proceedings. From these cases it appears that though the distribution of an intestate's estate under the order of the Court of Chancery amongst persons found to be the next of kin does not conclude the right of the persons who have an equal or paramount title, yet the Court will not assist other next of kin, who, with full notice of the proceedings in the suit wherein the fund was distributed, have neglected to prosecute their claims.

It is clear that there is a broad distinction between the position of a person who had no notice of the proceedings in an administration suit in which a fund has been distributed, and who, upon becoming aware of the facts, seeks to make the

recipients of the fund refund, and that of a person who, with notice of such proceedings and with knowledge of the questions which can be raised therein, neglects to contest the matters upon which his rights, if any, depend, and allows the fund to be distributed; and then, after a time, seeks to reopen the whole matter.

In the one case, the claimant has done nothing which ought to affect his rights against the recipients; whereas, in the second, it would, in my opinion, be inequitable to allow him to come forward and compel the recipients to refund, after he has lain by and allowed them to act upon the belief that the fund has been properly distributed among them, and when there is little or no doubt that their positions and obligations have been affected by acting, as they apparently would be entitled to do, in such belief. In the present case it is clear that the plaintiff was aware of the Chancery proceedings as early as 1893, and no steps whatever were taken by her except those upon the summons which I have already stated. It is also clear that the plaintiff was aware, at the time of the Chancery proceedings, that there was a question as to the legitimacy of the said Emma Broughton, through whom the parties, who have been found entitled to the fund, claimed relationship to the deceased. In her affidavit in answer to the present application to dismiss this suit, the plaintiff states that at the time of her application in the Chancery proceedings she was unable, by reason of the impoverished state of her finances, to take any further steps to make the necessary inquiries and searches in support of, and thus to press, her claim at the time; but she alleges that she has not in any way acquiesced in the order of the Court for the distribution of the estate, or in the findings that Sir Henry Delves Broughton and the other three persons were the only next of kin of the intestate. In the same affidavit, however, she further states that in her affidavit in support of the summons in the Chancery proceedings she did not raise the point of the illegitimacy of the said Emma Broughton, as she had not the time or the means to investigate it, although she had always heard that Sir Thomas Broughton had lived with Mary Wickers as man and wife for some time before they were

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said to be married in 1766, if—which she did not believe—they were married then, or at all.

Neither the plaintiff nor her solicitor gave evidence before me at the hearing, and the facts were all taken from the affidavits and papers which were put in. She was represented on the summons in Chancery by a London firm of solicitors acting as agents for a firm of solicitors in Belfast—she was residing in Ireland at the time—and she had the opportunity of investigating the proceedings which had taken place in the Chancery suit; and, even if she or her solicitors did not do so, as to which there is no evidence before me, in my opinion she had notice of all those proceedings.

Moreover, as I have already pointed out, the plaintiff was always aware of the question of legitimacy which could be raised in connection with the relationship of those who have been found next of kin to the deceased; and, notwithstanding that knowledge, she took no steps, for three years at least after the money had been distributed amongst the next of kin, to question the Chancery proceedings and the orders made therein.

In my opinion, the plaintiff has practically acquiesced in the Chancery proceedings, and has been guilty of such laches as to disentitle her, according to the authorities to which I have referred, to maintain a suit against those who have received the estate to compel them to refund. Therefore, as the only object of the present suit to revoke the letters of administration and obtain a grant in her own favour is to assist her in an attempt to recover the funds which have been distributed, it follows that this Court ought not to assist the plaintiff, who has been guilty of laches in the way I have indicated, to obtain a grant which would be useless to her. This point of laches being decided against the plaintiff, it is unnecessary that any other questions which might be raised in the case should be gone into. In my judgment the suit must be dismissed with costs.

Solicitor for plaintiff: *W. W. Gabriel.*

Solicitors for defendant: *Witham, Roskell, Munster & Weld.*

H. D. G.

## KOCH *v.* KOCH.

1899
*June* 1.

*Divorce—Desertion—Husband's Refusal to Discharge Adulterous Servant—Consequent Separation by Wife—Decree.*

Upon a wife's petition for divorce on the ground of desertion and adultery, it appeared that the respondent had refused to break off relations with and to discharge a servant with whom, when taxed, he admitted that he had committed adultery. The petitioner thereupon left the house, and, although overtures were subsequently made by the respondent for a resumption of cohabitation, the petitioner never returned home, owing to the persistent refusal of the respondent to discharge the servant in question:—

*Held*, that the conduct of the husband constituted "desertion" within the meaning of the Divorce Acts.

THIS was an undefended suit by Louisa Kate Koch, praying for the dissolution of her marriage with Hermann Koch, on the grounds of his desertion and adultery.

The parties were married in 1872, and lived together happily for over ten years. There was no issue of the marriage.

A servant, who had been for many years in the employment of the petitioner and her family as housemaid, was taken ill towards the end of 1882, and, in consideration of her long and faithful service, the petitioner sent her on a sea voyage for the benefit of her health. During her absence, her place was filled by her sister, Alice Mooney.

Early in March, 1883, and partly in consequence of a communication made by the servant shortly after her return, the petitioner taxed the respondent with having committed adultery with Alice Mooney, and he admitted it.

The petitioner thereupon told him that unless he broke off his relations with Alice Mooney and discharged her, she (petitioner) would refuse to live with him. The respondent declined to discharge the girl, and the petitioner accordingly left the house.

Soon afterwards, the respondent went to see the petitioner and asked her to return; but, as he would not break off his relations with Alice Mooney, the petitioner refused. On two

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or three subsequent occasions the respondent asked the petitioner to return, but, for the same reason as before, she refused to do so.

For about two years after the petitioner left home the respondent made her an allowance; but he then stopped it, alleging losses in his business and consequent want of means. Some years later, under threat of legal proceedings, he made her an allowance for a year or so, but from about August, 1896, the payments had altogether ceased.

The respondent had for years been living openly with Alice Mooney, who had two children by him.

The present petition was filed in February, 1899.

*Barnard*, for the petitioner, submitted that the conduct of the respondent amounted, in law, to desertion. [He referred to *Graves* v. *Graves* (1) and *Pizzala* v. *Pizzala*. (2)]

GORELL BARNES J. I confess I should like to have heard the point argued, but I will follow those two cases. They seem to be in point. There will be a decree nisi, with costs.

Solicitors: *Michael Abrahams, Sons & Co.*

(1) (1864) 33 L. J. (P. & M.) 66. (2) *The Times*, June 5, 1896.

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[NOTE.—The decision of Butt J. in *Dickinson* v. *Dickinson*, (1890) 62 L. T. (N.S.) 330, to the same effect, was not referred to.—H. D. G.]

H. D. G.

## THE CARLOTTA.

1899
*April* 27;
*May* 11.

*Admiralty—Collision—Vessel Aground in Thames in Daytime—Thames By-laws*, 1898, *art.* 40—*Regulations for Preventing Collisions at Sea*, 1897, *art.* 4 (*a*).

The plaintiffs' steamship, whilst proceeding up the Thames in the daytime, took the ground in Limehouse Reach and remained fast. In accordance with art. 40 of the Thames By-laws, those in charge of her gave "four blasts of the steam whistle in rapid succession" to indicate that the vessel was "not under command." The defendants, the owners of a steamship, which was following her, and ran into her, alleged that those in charge of the plaintiffs' steamship ought to have hoisted two black balls in accordance with art. 4 (*a*) of the Regulations for Preventing Collisions at Sea:—

*Held*, by Gorell Barnes J., that—assuming, without deciding, that the Regulations for Preventing Collisions at Sea apply in the Thames, as being tidal waters, connected with the high seas, navigable by sea-going vessels—art. 4 (*a*) of those regulations was not applicable, because that article only provides for the exhibition of black balls by vessels not under command whilst afloat; and, secondly, because, if that article did apply to a vessel fast aground, the case was provided for by art. 40 of the Thames rules, and the sea regulations only come in where they are not excluded by express provision in, or the general scope of, the river rules.

Action of damage by collision.

The plaintiffs were the owners of the *Dundee*; the defendants were the owners of the *Carlotta*.

The case is reported on the question as to the extent of the application of the Regulations for Preventing Collisions at Sea to the river Thames.

The material facts were shortly that:—

On November 21, 1898, about 3.20 P.M., the *Dundee*—a British screw steamship of 1397 tons gross register, and thirty-two hands, from Dundee to London with a general cargo, and seventeen passengers—was proceeding in charge of a pilot, in fine clear weather with a flood tide, up Limehouse Reach of the river Thames, when she took the ground and remained fast. In accordance with art. 40 of the Thames By-laws (1)

(1) By-laws for the regulation of the river Thames and the navigation thereof, made under the authority of the Thames Conservancy Act, 1894,

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four short blasts in rapid succession were at once sounded on the steam whistle, and repeated, to indicate that the vessel was not under command, but the *Carlotta*—a Norwegian screw steamship of 612 tons gross register, and fifteen hands, with a cargo of oranges from Valencia and Gandia to London, in charge of a pilot—which was following the *Dundee*, ran into her stem on, owing to the failure of those on the look-out on board the *Carlotta* to warn the pilot that the *Dundee* remained stationary.

It was contended on behalf of the defendants that those in charge of the *Dundee* neglected to obey art. 4 (*a*) of the Regulations for Preventing Collisions at Sea (1) by failing to exhibit two black balls to indicate that she was, from an accident, not under command, and also that those in charge of the *Dundee* should have rung their bell in accordance with art. 38 of the Thames By-laws. (2)

On behalf of the plaintiffs it was contended that the Regulations for Preventing Collisions at Sea were not applicable to the river Thames, and that, if they did apply, art. 4 (*a*) of those regulations was superseded by the express provisions of art. 40 of the Thames By-laws; and, secondly, that art. 38 of the Thames By-laws did not apply to this case.

April 27. *Pickford, Q.C.*, and *C. Head*, for the plaintiffs, the owners of the *Dundee*.

*Carver, Q.C.*, and *Stubbs*, for the defendants, the owners of the *Carlotta*.

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and confirmed by the Board of Trade, April 27, 1898.

Art. 40: "When a steam vessel . . . . is turning round or for any reason is not under command and cannot get out of the way of an approaching vessel . . . . she shall signify the same by four blasts of the steam whistle in rapid succession each blast to be of about one second's duration."

(1) Regulations for Preventing Collisions at Sea, 1897.

Art. 4 (*a*): "A vessel which from any accident is not under command shall . . . . by day carry in a vertical line one over the other not less than six feet apart, where they can best be seen, two black balls or shapes, each two feet in diameter."

(2) Thames By-laws, 1898.

Art. 38: "All steam and sailing vessels when in the fairway of the river and not under way shall at intervals of about one minute ring the bell rapidly for about five seconds."

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[The arguments of counsel fully appear from the judgment, and the material section of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), is there referred to. In addition to the cases mentioned in the judgment, the following were cited: *The Franconia* (1); *The Ripon* (2); *The Leverington* (3); *The Monte Rosa* (4); Marsden on Collisions at Sea, 4th ed. pp. 66, 369.]

*Cur. adv. vult.*

May 11. GORELL BARNES J. [After dealing with the facts already set out, and finding the *Carlotta* alone to blame for the collision, and that the plea of compulsory pilotage failed owing to the pilot not being properly warned of the position of the *Dundee*, the learned judge continued:—]

It was argued on behalf of the defendants that the *Dundee* must in any event be held to blame, on the ground that she ought to have complied with art. 4 (*a*) of the Regulations for Preventing Collisions at Sea, by putting up two black balls to indicate that, from an accident, she was not under command. There is no doubt that those in charge of the *Dundee* did not do that, though after the collision they were put up for a short time, but hauled down again, as the pilot considered that their exhibition was wrong in the river; at any rate, they were not there at the time of the collision, and the defendants say that, if the balls had been put up prior to the collision, the fact that the vessel was aground would have been more readily noticed. I doubt whether it would have made any difference, for it seems to me, on the evidence, that those on board the *Carlotta* were so careless as not to be keeping a proper look-out; still I must deal with the point, because it was argued on behalf of the defendants that it might have affected the case. This is really a point of law.

On behalf of the plaintiffs it was argued that art. 40 of the Thames By-laws was complied with, and that, as that article deals with the case of a vessel not under command, the sea rules do not apply, and that, therefore, art. 4 (*a*) does not

(1) (1876) 2 P. D. 8.
(2) (1885) 10 P. D. 65.
(3) (1886) 11 P. D. 117.
(4) [1893] P. 23.

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apply. On the defendants' side it was contended that the sea rules do apply, and that when they are applied art. 4 (*a*) applies to this particular case, so that a sight signal was required as well as the sound signal required by art. 40 of the Thames rules.

The first question is whether the sea rules apply. The Regulations for Preventing Collisions at Sea at present in force, namely, those of 1897, are made under the authority of s. 418 of the Merchant Shipping Act, 1894, which provides for the making of "Regulations for the Prevention of Collisions at Sea." The regulations themselves, as drawn, commence with a preliminary statement that "These rules shall be followed by all vessels upon the high seas and in all waters connected therewith, navigable by sea-going vessels." It is also provided by art. 30 of those regulations that "Nothing in these rules shall interfere with the operation of a special rule duly made by local authority, relative to the navigation of any harbour, river, or inland waters." For reasons which I will give presently, I do not think it is absolutely necessary for me to determine whether the sea rules apply or not, though—assuming that there are either no rules, or no rules which ought reasonably and properly to prevent their application—my present opinion is that they would apply—that is to say, I think that the sea regulations, in such circumstances, are intended, and ought, to apply to tidal waters connected with the high seas navigable by sea-going vessels. There is no doubt that the Regulations for Preventing Collisions at Sea, for the time being in force, have, from time to time, been treated as so applying. For instance, in the cases of *The Concordia* (1), *The Velocity* (2), and *The Ranger and The Cologne* (3), the sea rules as then existing were treated as applying to the Thames.

I felt a little difficulty in understanding why the sea rules were assumed to apply, and why the Thames rules were not considered in those cases; but the explanation appears to be that, at the time those cases were decided, the "steering and

(1) (1866) L. R. 1 A. & E. 93. (2) (1869) L. R. 3 P. C. 44.
(3) (1872) L. R. 4 P. C. 519.

sailing" part of the rules of the Thames, as we now have them, had not been framed. As far as I can ascertain, the rules at that time in the Thames were those which were made in the years 1860, 1862, and 1864, as by-laws under the provisions of the Thames Conservancy Act, 1857. These by-laws only contain a general rule that vessels are to be navigated in a careful manner, together with certain provisions as to lights. It was not until 1872 that the sailing and steering part of the rules applicable to the Thames seem first to have been put forward in their present shape. This seems to be the reason why no reference is made in the cases I have mentioned to anything but the sea rules. Then, again, the sea rules have been treated as applying in the Humber in the case of *The Germania* (1), and in the Clyde in *The Ariadne* (2), where, as far as I can see, there was nothing to prevent their application. If, therefore, this case were to depend upon an absolute decision whether the sea rules applied in the Thames, I should be disposed to hold that they did apply.

But whether the sea rules apply in the Thames or not, it seems to me that art. 4 (*a*) of those rules does not apply to a case like the present. That article is applicable in its terms to "a vessel which from any accident is not under command," and, in my opinion, those words do not apply to a vessel which is fast aground. They apply to a vessel which is afloat. They might apply to a vessel touching and moving, but I do not think they apply to a vessel which is hard and fast aground. The words I have read lead me to that view, and that view is fortified by the fact that in art. 11 of the sea rules there is an express provision for "a vessel aground in or near a fairway" to carry the light or lights mentioned in that article and the two red lights prescribed by art. 4 (*a*). Art. 11, therefore, deals with the case of a vessel aground at night, but does not provide for the case of a vessel aground in the daytime. The view I have expressed is further fortified by what is to be found in art. 15, sub-s. (*e*), of the same rules, namely, that "a vessel

(1) (1875) 1 Maude and Pollock on Shipping, 4th ed. p. 606, note (*i*).

(2) *Little* v. *Burns, The Owl and The Ariadne*, (1881) 9 Rettie, 118.

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under way, which is unable to get out of the way of an approaching vessel through not being under command, or unable to manœuvre as required by these rules, shall . . . . at intervals of not more than two minutes, sound three blasts in succession." It is also material to notice that there is, in the present Thames rules (art. 30), a provision for "a vessel of 150 feet or upwards aground in or near a fairway" carrying certain anchor lights, which shews that the Thames rules, when dealing with a ship aground, require that, at night, certain lights shall be carried, but make no provision with regard to a ship aground in the daytime. The reason suggested to me by the Elder Brethren for this apparent omission is that, in the daytime, you can see that a ship is aground, and that if you cannot see her by reason of fog or other analogous cause, then she must make some signal—I have not considered exactly what—to warn other vessels of her position. But there is this further consideration—that even if art. 4 (*a*) were to apply to a vessel aground it would not in my opinion apply to a vessel aground in the Thames; because, assuming that the words in that article, "vessel which from any accident is not under command," apply to a ship aground, there is an express provision in art. 40 of the Thames rules for giving a signal "by four blasts of the steam whistle," and there is no provision for putting up balls in the daytime. It seems to me that if you find an article in the Thames rules which—assuming that art. 4 (*a*) of the sea rules applies to a ship aground—would also apply to a ship in that position, then it is not consistent with the whole scope of those rules, or with some decisions, to require that the provision in art. 40 of the Thames rules should be supplemented by the provision in the sea rules. In other words, art. 30 of the sea rules comes into operation and prevents the interference of the sea rules with the operation of the special rule duly made by local authority.

The argument for the defendants was that, assuming art. 40 of the Thames rules applied, and required one signal, art. 4 (*a*) of the sea rules added another, to be given at the same time. To my mind this argument is not sound, because I think that where there is a certain rule which deals with the whole scope

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of the subject, to add parts of provisions of the sea rules would be to interfere with the operation of the river rules.

I am strengthened in this view by the decision of Butt J. in *The Éccossaise*. (1) That was a case of collision in the Thames, and in a part of the Thames in which there is no starboard-hand rule, as there is in the sea rules, but, according to the argument for the defendants, there would be nothing inconsistent, where the Thames rules are silent, in adding to the Thames rules from the sea rules. Butt J., however, held that they did not apply, for it is obvious, when considering that case, that the starboard-hand rule in that part of the Thames was left out because it is necessary for the navigation of the Thames that there should not be any such rule in that part of the river. To imply such a rule from the sea rules would therefore be inconsistent with the general scope of the Thames rules.

On these grounds, in my opinion, the signal which it is contended by the defendants should have been given by the *Dundee* was not required, and there was no breach by her of the sea rules, even if those rules are to be considered as applying to the Thames.

I only desire to notice one other point urged by the defendants, namely, that under art. 38 of the Thames rules the *Dundee* ought to have rung a bell. That rule does not, in my opinion, apply to this case. In the result, and for the reasons I have already given, I find the *Carlotta* alone to blame for this collision, and that her owners are liable.

Solicitors for plaintiffs, the owners of the *Dundee*: *Thomas Cooper & Co.*

Solicitors for defendants, the owners of the *Carlotta*: *Stokes & Stokes.*

(1) (1885) Dec. 15. *Shipping Gazette.*

T. L. M.

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*May* 11, 12.

[IN THE COURT OF APPEAL.]

## THE GANNET.

*Admiralty—Collision—Second Anchor Light—"At or near the stern"—Regulations for Preventing Collisions at Sea, Art.* 11.

The plaintiffs' steamship, 455 feet long, with two masts, was at anchor at night in the river Elbe, athwart the channel, slowly swinging to the first of the flood with her starboard side up river. She had two anchor lights up, the one aft hanging inside the fore-shroud of the port main rigging, 120 feet from the stern.

The defendants' steamship coming down the river did not see the after light until too late to avoid a collision, and struck the plaintiffs' vessel on her starboard side between the forward and after lights. By art. 11 of the Regulations for Preventing Collisions at Sea, the second light is to be carried "at or near the stern":—

*Held*, by the Court of Appeal (A. L. Smith, Vaughan Williams and Romer L.JJ.), affirming the decision of Bucknill J., that the plaintiffs' vessel was to blame, as the position of the light aft was a breach of the statutory rule, and the plaintiffs had failed to prove that the infringement could not possibly have contributed to the collision; but varying the decision by finding the defendants' vessel also to blame for defective look-out, as the position of the light was such that those in charge of her might have seen it sooner.

APPEAL by plaintiffs, in an action of damage by collision, against a decision of Bucknill J. finding their vessel alone to blame for a breach of the statutory rule requiring a second anchor light to be carried "at or near the stern." (1)

The facts were shortly as follows:—

On November 19, 1898, about 4 A.M., the plaintiffs' screw steamship *Algoa* of 7575 tons gross register, and 455 feet long, was at anchor in the Elbe off Brunshausen. She had come

(1) Regulations for Preventing Collisions at Sea, 1897, art. 11: ". . . . A vessel of 150 feet or upwards in length, when at anchor, shall carry in the forward part of the vessel, at a height of not less than 20, and not exceeding 40, feet above the hull, one (white) light (in a lantern so constructed as to shew a clear, uniform, and unbroken light visible all round the horizon at a distance of at least one mile), and at or near the stern of the vessel, and at such a height that it shall not be less than 15 feet lower than the forward light, another such light . . . ."

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up the river in charge of a pilot a few days before, on a voyage from New York to Hamburg, but had been delayed by fog.

The wind, at the time in question, was south-easterly, fresh, the weather gloomy, and the tide the first of the flood of about one knot. The *Algoa*, with sixty fathoms of cable out, was swinging to her starboard anchor very slowly owing to the sluggishness of the tide, and the direction of the wind which tended to check her progress, and was heading across the channel to the northward with her starboard side up river and her stern about 200 yards from the south shore; when the defendants' steamship *Gannet* — of 1246 tons gross register from Hamburg to London with a general cargo, in charge of a pilot, and coming down the river—ran into her and struck her on the starboard side about twenty feet forward of the mainmast.

The *Algoa* had, at the time, a globe lantern anchor light forward on the forestay, thirty-eight feet from the deck, a second one aft hanging down on the inside of the fore-shroud of the port main rigging, twenty feet from the deck, and 120 feet from the stern. She had also the customs (Bismarck) lights, white and green, hanging from the flagstaff at the stern.

Those in charge of the *Gannet* alleged that they saw the forward anchor light of the *Algoa* at a distance of about a mile slightly on the starboard bow. They assumed that the *Algoa* was riding head to tide, and only observed the second anchor light at about a ship's length distant at the same time that they made out the hull of the vessel right athwart the river, head to the northward, and apparently aground. The engines of the *Gannet* were put full speed astern, the helm hard-a-starboard, and the anchor let go, but, before the headway of the *Gannet* could be got off, the collision occurred.

The action was tried on April 12 and 13, 1899, by Bucknill J., assisted by two of the Elder Brethren of the Trinity House. On April 19 the learned judge delivered judgment, pronouncing the *Algoa* solely to blame, and with reference to the position of the second light said: "The fixing of the after anchor light in the port fore-shroud of the mainmast of the *Algoa* was a breach of art. 11 of the Regulations for Preventing Collisions

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at Sea. The distance of the light from the stern was . . . . 120 feet, and that cannot be called in the words of the rule 'at or near the stern.' The excuse of the pilot for putting it there was because the Bismarck (Customs) lights were exhibited at the stern, and he stated that he was in the habit of placing the after anchor light in the main rigging, or if the ship had three masts, in the mizzen rigging. Such an excuse is no answer to a breach of the regulations." With reference to the question whether the plaintiffs had under the circumstances proved that the breach of the regulations could not have contributed to the collision, the learned judge said :—

"In answering this question I have relied upon the advice given me by the Elder Brethren rather than upon my own view. They tell me that it is impossible to say that the second anchor light may not have been entirely hidden from the view of those on board the *Gannet* as she approached the *Algoa*, or at as great a distance as even one mile, when the forward light was seen and reported.

"That being so, it is impossible for me to say that the fact that the light was hidden could not have contributed to the collision. If it had not been hidden the pilot of the *Gannet* would have known that the *Algoa* was athwart the tide, and would have taken steps to avoid her; but I must add that it seems strange that the light should have been hidden from the *Gannet* for so long a time, seeing that she was proceeding in a straight line on a steady helm, and seeing that, as I have found as a fact, the *Algoa* was swinging, although slowly.

"That means to say that if the *Gannet* was approaching the *Algoa* under a steady helm, pointing towards her stern as the pilot says she was doing, and practically at right angles to the *Algoa*, which was practically athwart the river; then the nearer the *Gannet* got to her, there would be some change of the light, which at one moment might be hidden, and at another might be partly hidden, and at another moment not hidden at all, by the mast or shrouds of the *Algoa*. But the Elder Brethren tell me it is quite possible that, although that was the condition of things, the light may have been entirely

hidden by the mast and shrouds, or partly by one, and partly by the other, during the whole time the *Gannet* was proceeding down the river for the space of one mile, at which distance the forward anchor light was seen.

"It follows, therefore, that if that light was never visible to those on board the *Gannet* until it was too late to avoid the collision, there was no contributory negligence on the part of those on board that ship; they had no light to guide them except the forward light, which was in the circumstances a misleading one."

The plaintiffs appealed, contending, first, that the *Gannet* was alone to blame as the second anchor light of the *Algoa* could, and ought to, have been seen earlier if those in charge of the *Gannet* had been keeping a proper look-out, and, as the *Algoa* was struck between the two lights, the position of the light could not by any possibility have contributed to the collision. Secondly, assuming that the *Algoa* was to blame for a breach of the statutory rule as to the position of the light, the *Gannet* was also to blame for contributory negligence in having a defective look-out.

*Aspinall, Q.C.*, and *Alex. D. Bateson*, for the appellants (plaintiffs), the owners of the *Algoa*.

*F. Laing*, and *Lauriston Batten*, for the respondents (defendants), the owners of the *Gannet*.

[The cases of *The Englishman* (1), *The Chusan* (2), and *The Lapwing* (3) were referred to.]

A. L. SMITH L.J. This appeal raises a question of some nicety. [The learned judge then dealt with the facts already set out, and, after reading art. 11 of the Regulations for Preventing Collisions at Sea, continued:—]

The *Algoa* did not carry the second anchor light "at or near the stern" in accordance with the rule, and it seems to me clear beyond argument that, in the position and condition in which the *Algoa* was at the time of the collision, she committed

(1) (1877) 3 P. D. 18. (2) (1885) 5 Asp. M. L. C. 476.
(3) (1882) 7 App. Cas. 512.

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a breach of the rule. Therefore, primâ facie she must be held to be in the wrong; but the matter does not stop there. The case goes on in this way. The owners of the *Algoa* say: "It is quite true that we had not a second anchor light up in the position in which we ought to have had it; but, if you, the *Gannet*, had had a good look-out, you would have seen both our lights which we had up. You were, therefore, guilty of negligence in coming on in such a way as to strike our vessel twenty feet forward of the main-mast."

The question, therefore, is: Could the second light have been seen by persons on board the *Gannet*, if they had kept a good look-out, and navigated their ship with reasonable care? We are advised by our nautical assessors that, if a good look-out had been kept it was impossible that those in charge of the *Gannet* should not have seen that second light. That appears to have been the view of Bucknill J. in the Court below, though the Elder Brethren advised him otherwise. [The learned judge then dealt with the evidence as to the possible obscuration of the light by the mast, shrouds, or boats, and continued:—]

We have asked our nautical advisers as to the possibility of the second light of the *Algoa* being obscured, and they say, "No; this ship was swinging to her anchor, and therefore somewhat in motion, and, in our judgment, it is impossible that that second light should have been obscured, to the ship coming down at right angles to her, for any length of time." We are of the same opinion, and, therefore, come to the conclusion that the allegation of the *Algoa* against those in charge of the *Gannet* is made out, and that they had not a proper look-out, and are consequently also to blame.

Then comes the other question. The appellants (the *Algoa*) go a step further and say, that although they must admit that they were in fault in not having a globular light at the stern in accordance with the rule, yet that breach of the rule could not by any possibility have contributed to the collision, for the *Algoa* was struck between the two lights, and therefore, if the vessel had only been as long as the distance between the two lights, she would have been struck all the same, and the

placing of the light, "at or near the stern" according to the rule, would have made no difference. I cannot, however, hold that if the *Algoa* had had the second light at or near the stern, that is, some 455 feet from her bows, such a light, in its then proper position, might not have obviated the casualty. In my opinion it is, upon the evidence, impossible to say that if that second light had been exhibited at or near the stern of the *Algoa* that might not have made all the difference to those on board the *Gannet*, and there is evidence that those on board the *Gannet* were looking at what was occurring in the neighbourhood where the light would then have been.

In the result, both vessels must be held to blame.

VAUGHAN WILLIAMS and ROMER L.JJ. concurred.

*Appeal allowed. Both vessels to blame; no costs in the Court of Appeal or in the Court below.*

Solicitors for appellants (plaintiffs): *Pritchard & Sons, for Batesons, Warr & Wimshurst, Liverpool.*

Solicitor for respondents (defendants): *William Batham.*

T. L. M.

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1899
*May* 11.

[IN THE COURT OF APPEAL.]

## THE YDUN.

*Admiralty—Damage—Practice—Action against a Harbour Board—Limit of Time for Commencement of—Public Duty—Costs—Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

By the Ribble Navigation and Preston Dock Act, 1883 (46 & 47 Vict. c. cxv.), the defendants, the mayor, aldermen, and burgesses of the borough of Preston, are constituted the port and harbour authority for the port and harbour of Preston.

By the Public Authorities Protection Act, which was passed on December 5, 1893, and came into force on January 1, 1894, an action against any person, in respect of any alleged neglect or default in the execution of any Act of Parliament or of any public duty or authority, must be commenced within six months next after the act, neglect, or default complained of.

The plaintiffs, owners of a barque, issued a writ, on November 14, 1898, in an Admiralty action, against the defendants for damages sustained by the grounding of their vessel on September 13, 1893, in the river Ribble within the port and harbour of Preston, through the alleged negligence of the defendants in inviting the vessel to come up when there was not sufficient water in the channel leading to the docks. The President (Sir F. H. Jeune) dismissed the action with costs to be taxed as between solicitor and client :—

*Held*, by the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.), affirming the decision of the President, that the defendants were acting in pursuance of their public duties, so that s. 1 of the Public Authorities Protection Act, 1893, applied, and as that statute, dealing with procedure only, was retrospective, the action was barred after the expiration of six months from the default complained of.

Appeal by plaintiffs, D. Lohne and others, the owners of the barque *Ydun*, from a judgment of the President (Sir F. H. Jeune) in favour of the defendants, the mayor, aldermen, and burgesses of the borough of Preston.

The case is reported on the question whether the defendants were persons acting in pursuance or execution of any statutory or public duty or authority, and therefore entitled to avail themselves of the provisions of the Public Authorities Protection Act, 1893. (1)

(1) 56 & 57 Vict. c. 61. Passed December 5, 1893, and came into force on January 1, 1894. Sect. 1 : " Where after the commencement of this Act any action . . . . is commenced in the United Kingdom against any per-

The facts, so far as material were shortly that:—

On September 13, 1893, the plaintiffs' barque *Ydun* sustained damage by grounding in the river Ribble within the port and harbour of Preston. On November 14, 1898, the plaintiffs issued a writ in an Admiralty action against the defendants, and by their statement of claim alleged that the defendants were constituted by statute the port and harbour authority for the port and harbour of Preston; that the *Ydun* arrived off the entrance to the Ribble, and was taken in tow by a steam-tug of the defendants to be taken up the river to the docks, and whilst so proceeding took the ground in the channel.

By par. 4, the plaintiffs alleged that "the defendants negligently invited and allowed the *Ydun* to come up the said channel and negligently failed to warn her not to come up, and the damage was sustained in consequence of that negligence." Par. 5 alleged a warranty "that upon the tide in question there would be sufficient water in the channel leading to the docks, and that the said channel was and would be fit to enable the *Ydun* to pass up to the docks in safety."

The defendant corporation by their defence admitted the stranding, denied that the damage was caused or contributed to by their negligence or that of their servants, and alleged that "the vessel was in charge of a duly licensed pilot whose employment was compulsory by law and who was not the servant of the corporation."

The defendants further admitted that they were the port authority for the port and harbour of Preston under the Ribble Navigation and Preston Dock Act, 1883 (1), and they relied upon the Public Authorities Protection Act, 1893.

son for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:

"(*a.*) The action . . . . shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of . . . .

"(*b.*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client . . . ."

(1) 46 & 47 Vict. c. cxv. (local) (passed July 16, 1883): "An Act for the transfer of the undertakings of the

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The action was tried on March 8, 9, and 10, 1899, by the President (Sir F. H. Jeune) assisted by two of the Elder Brethren of the Trinity House.

Ribble Navigation Company to the mayor aldermen and burgesses of the borough of Preston and to enable them to improve the river Ribble and the navigation thereof and to construct docks and other works at Preston and for extending the borough of Preston and for other purposes."

By s. 4, The Harbour Docks and Piers Clauses Act, 1847, is incorporated with the Act so far as applicable, and not varied by or inconsistent with it.

By the interpretation section (s. 5), "the corporation" means the mayor, aldermen, and burgesses of the municipal borough of Preston, whether acting under the provisions of the Municipal Corporations Acts or in the execution of the Acts relating to the port and harbour of Preston, and "the port" and "the harbour" mean the port and harbour of Preston by this Act constituted.

As to the execution of the Act by the corporation, s. 6 provides that: "Subject to the provisions of this Act this Act shall be carried into execution by the corporation acting by the council and according to the Municipal Corporations Acts and Ribble Acts respectively and any other Acts for the time being affecting the corporation as a municipal body or as the harbour authority for executing the Harbour Acts respectively and with all the rights powers privileges exemptions and authorities conferred by those Acts respectively on the corporation and on the council and committees of the council and the officers agents and servants of the corporation with respect to matters provided for by or comprised in the before-mentioned Acts respectively and (subject to the provisions of this Act) as nearly as may be in all respects as if the powers duties exemptions and property vested in or imposed on or enjoyed by the corporation by or under this Act were vested in imposed on or enjoyed by them by or under those Acts respectively."

By s. 7, "So much of the river Ribble and any diversion thereof under the powers of this Act as lies between the said North Union Railway Bridge and the sea together with the dock and works shall be and is hereby constituted the port and harbour of Preston and the corporation shall be and are hereby constituted the port and harbour authority thereof."

By s. 37, "From and after the vesting day and subject to the provisions of this Act all the rights powers privileges and authorities of the Ribble Company under the Ribble Acts and under any enactment for the protection of the Ribble Company or the Ribble undertaking including the right to levy demand receive and recover any tolls rates and charges which the Ribble Company may levy demand receive or take shall be by virtue of this Act transferred to and vested in the corporation and those Acts and enactments shall be read and have effect as if the corporation had been therein named instead of the company. . . ."

By s. 80, "The corporation may demand and take the following tolls for or in respect of the use of the harbour (that is to say):

"For or in respect of all vessels entering or using the harbour the

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[In addition to the cases mentioned in the judgment the following were referred to: *Jolliffe* v. *Wallasey Local Board* (1); *Indermaur* v. *Dames* (2); *Knight* v. *Lee* (3); *Reg.* v. *Leeds and Bradford Ry. Co.* (4); Maxwell on the Interpretation of Statutes, 3rd ed., 1896, pp. 301, 312.]

On March 25 the President delivered a considered judgment in favour of the defendants on the merits, holding that the stranding was due to the negligence of the pilot, who was not the servant of the defendant corporation, and with reference to the question whether the action was barred by the operation of the Public Authorities Protection Act, 1893, the learned judge read s. 1 of the Act (already set out), and continued:—

"The question is, whether the protection of this section of the Act is given to municipal bodies in the execution of duties not strictly municipal or official, but duties arising in connection with a commercial enterprise which they are empowered by Parliament to undertake. It is curious, to begin with, to observe that the language does not in terms refer to a municipal or public authority, the words only are 'any person,' and, limiting one's view to the enacting words of the Act, it is not easy to see why a railway company, for example, a corporation which certainly does acts in pursuance or execution of an Act of Parliament, is not included. This clearly, however, is not what the Act means, and, as has been pointed out in the case of *Fielding* v. *Morley Corporation* (5) in the Court of Appeal, it must be gathered from the short title of the Act, 'The Public Authorities Protection Act, 1893,' that it is only public

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tolls specified in schedule 5 to this Act" (namely, 6*d.* per ton); and—

By s. 82, "In addition to the harbour tolls the corporation may from time to time demand and take for or in respect of every vessel using or entering the dock or lying therein or departing therefrom any sum not exceeding the (dock) rates mentioned in schedule 7 to this Act" (namely, 6*d.* to 1*s.* per ton according to port from whence the vessel came).

By s. 114, power is given to the corporation to make by-laws as to docks, quays, &c., and for regulating the conduct of the owners, masters, and crews of steam-vessels, and the towing of vessels.

(1) (1873) L. R. 9 C. P. 62.
(2) (1867) L. R. 2 C. P. 311.
(3) [1893] 1 Q. B. 41.
(4) (1852) 18 Q. B. 343.
(5) [1899] 1 Ch. 1.

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authorities that come within the purview of the Act. But the question is, Are the acts of a public authority protected when it is acting in pursuance of trade or business which in private hands would be of a private character? Even apart from authority, I should have entertained little doubt on the point. It has been and may be questioned whether, and to what extent, municipal authorities should be authorized by Parliament to engage, possibly in competition with private traders, in what would otherwise be the subject of private commercial enterprise. But if Parliament decides that a public authority should be so authorized, if it confers on a municipality the right and duty to assume the functions of a trader, it clothes those functions with a public character, and makes them just as much public duties of a public authority as those for the performance of which that authority was created. If a municipality is authorized to supply water or gas, I can see no distinction in character between its acts, its contracts, and its defaults, in supplying those articles, and its acts, contracts, and defaults in repairing roads or maintaining street lamps. The analogy of the State itself may be invoked to negative any such distinction. The transmission of letters and telegrams, if not monopolised by the State, would doubtless be performed by private enterprise. But surely the State acts just as publicly and officially in its administration of the Post Office as of any other of its departments. It executes a public duty or authority just as much when it builds a post-office as when it builds a ship, when it collects correspondence as when it enlists a regiment. In the same way, I cannot doubt that the corporation of Preston in carrying out under statutory authority its enterprise of the Ribble navigation, a water highway to Preston, acts as a public authority executing a public duty as much as when it makes or maintains the land highways within the ambit of the municipality. I think, further, that the point is covered by authority. The cases of *Harrop* v. *Mayor of Ossett* (1), which was the case of a municipal authority building a hospital, and of the *North Metropolitan Tramways Co.* v. *London County Council* (2), as well as the case of *Fielding* v.

(1) [1898] 1 Ch. 525. (2) [1898] 2 Ch. 145.

*Morley Corporation* (1), are instances in which this Act was held to apply to municipal corporations carrying out works outside the scope of strictly municipal duties. An endeavour was made before me to distinguish those decisions on the ground that they apply to the construction of works, and not to the carrying on of a business by contracts with private individuals. But I can see no ground for this distinction. Whether a corporation is constructing a work or using it, whether, for example, it is building an aqueduct and laying pipes from it, or supplying a consumer from the aqueduct by means of the piping, it appears to me to be equally engaged in executing the duties imposed on it by Act of Parliament, and, though it may be asked why a corporation so acting should receive privileged advantages in litigation, I cannot doubt that the Act in question has conferred them.

"There remains another point. The cause of action in this case arose on September 13, 1893, and the Act with which we have to deal was passed on December 5, 1893, to come into force on January 1, 1894. It is, therefore, urged that a retrospective force should not be given to the Act so as to make it include the subject-matter of the present action. There is no doubt of the soundness of the principle appealed to. In *Reid* v. *Reid* (2) Bowen L.J. spoke of 'The trite maxim omnis nova constitutio futuris formam imponere debet non praeteritis'—that is, that except in special cases 'the new law ought to be construed to interfere as little as possible with vested rights'; but he added that this rule of construction is valuable only when the words of an Act of Parliament are not plain. I am not sure that it may not be said that in the present instance they are plain. But I feel on firmer ground in saying that the interference with vested rights suggested in this instance is hardly appreciable. I will not refer at length to the authorities, which are well collected in Maxwell on Statutes, but it is clear that what must be taken to be an improvement in procedure is not to be considered as interference with a vested right of those who would have preferred the procedure to remain in its unreformed condition; and, further, inasmuch as the most

(1) [1899] 1 Ch. 1. (2) (1886) 31 Ch. D. 402, at p. 408.

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aggravated case of interference possible under the Act in question is that of a person who, having had nearly five months in which to bring his action, has allotted to him almost a month longer in which to bring it, there appears to me no difficulty in considering that, with full consideration for the principle referred to, the Legislature intended this Act to be, in the sense and to the extent I have mentioned, retrospective. I think, therefore, that the Public Authorities Protection Act, 1893, does bar the present action, and that there must be judgment for the defendants with costs which must, as the Act provides, be taxed as between solicitor and client."

May 11. The plaintiffs appealed, both on the merits and as to the statutory bar; but this report is limited to the arguments on the latter point.

*Robson, Q.C.*, *Carver, Q.C.*, and *Stokes*, for the appellants (plaintiffs). On two grounds the defendants are not entitled to rely on the Public Authorities Protection Act, 1893, namely, first, because they neglected duties towards the plaintiffs to which the provisions of the Act are not applicable; and, secondly, because, assuming the Act to apply, it is not retrospective.

As to the first point. The statute only deals with actions against a public authority when acting in the performance of public duties. It may be that it would apply to matters connected with the acquisition of such property as railways, docks, and plant by the corporation of Preston under their Act, as well as to the due management of it, in regard to the public, as in keeping the channel dredged to a certain depth—that is to say, the benefit of the statute could be claimed when the defendants were acting, in accordance with the title of the statute, as a public authority: see *Fielding* v. *Morley Corporation* (1); but a duty cast upon a public body is not always a public duty, as the learned judge in the Court below seems to have thought, for when this municipal corporation is not doing anything in the nature of a public duty, but dealing as a trading corporation with private individuals, as in the case of

(1) [1899] 1 Ch. 1.

the private duties arising out of the deposit of goods in their warehouses, the carriage of goods by their railways, the towage of the plaintiffs' ship from sea to dock, or the lightening of vessels at their own expense, the defendants are not entitled to the protection of the statute, as they are not acting as a public authority. So, after the corporation purchased the undertaking of the Ribble company, the right to the tolls and dues levied in respect of these various private contracts did not arise from their position as a public authority under their statute, but from their ownership of the premises, and the Ribble Navigation Act only limits, in the interest of the public, the amount of the rates which may be demanded. In this case the act complained of by the plaintiffs—namely, that the defendants, as dock owners, invited the plaintiffs to bring their ship to the dock when there was not water enough—was a private grievance.

As to the second point. The statute in question deals with practice and procedure, and, in the words of Maxwell on the Interpretation of Statutes, p. 317, citing *In re The Phœnix Bessemer Steel Co.* (1), the new procedure would be presumably inapplicable, where its application would prejudice rights established under the old procedure; so that, assuming the default complained of to be within s. 1 of the statute, still the protection afforded by the statute only applies to acts done subsequent to the Act. It is a well-established rule that an Act of Parliament which affects existing vested rights will not be held to have any retrospective effect, unless express provisions are inserted in the statute shewing a distinct intention to extinguish rights which had accrued before the statute came into force: *Moon* v. *Durden* (2); see also the Interpretation Act, 1889 (52 & 53 Vict. c. 63), s. 38, sub-s. 2 (*c*); *Wright* v. *Greenroyd* (3); *Gardner* v. *Lucas* (4); *Jackson* v. *Woolley*. (5)

*Joseph Walton, Q.C.*, and *F. Laing*, for the respondents (defendants), were not called upon.

(1) (1875) 45 L. J. (Ch.) 11.
(2) (1848) 2 Ex. 22, per Rolfe B., at p. 33.
(3) (1861) 1 B. & S. 758.
(4) (1878) 3 App. Cas. 582, per Lord Blackburn, at p. 603.
(5) (1858) 8 E. & B. 784.

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A. L. SMITH L.J. [After referring to the allegations in the statement of claim, already set out, and to the decision of the President in favour of the defendants on the merits, the learned judge proceeded :—]

It is only necessary for me to express an opinion on that part of the case which relates to the decision of the President dealing with the question of the statutory bar arising under the Public Authorities Protection Act, 1893.

It is, in the first place, contended that s. 1 of this Act does not include the present case, because the defendants, the corporation of Preston, in doing what they did were not a public body acting in pursuance of an Act of Parliament, or in execution of any public duty or authority. Now let us see whether they were exercising a duty imposed upon them by law. I find that by s. 4 of the Ribble Navigation and Preston Dock Act, 1883, the Harbour, Docks, and Piers Clauses Act, 1847, is incorporated, and it appears to me that without the Act of 1883, incorporating the Act of 1847, the corporation of Preston has no authority over the port and harbour of Preston down to the sea, for it is only by reason of this Act that the corporation has any power to execute works, and it is under s. 80 that the corporation derives its power to take tolls ; otherwise the corporation of Preston could not take a penny's worth of tolls from any ship coming into the Ribble and going into their docks.

Counsel for the appellants have put the case of a special bargain between a shipowner and the corporation to the effect that the corporation lets out the use of a warehouse and the shipowner pays, say, 5*l.* a week ; but that is not this case, for, except under the Act of 1883, the corporation of Preston has no right to take tolls for any of the advantages offered to ships entering and coming into the harbour and dock of the corporation. It has been argued that the effect of the section as to tolls is only to fix a limit, as in the schedule, of 6*d.* or 8*d.* per ton, but, in my opinion, the section I have referred to gives the right to take the tolls. There is also another section which gives the corporation power to make by-laws.

In view of these provisions of the Act in question I cannot

say that this public body, the corporation of Preston—acting as it was, at the material time, through its harbour-master —was not acting in pursuance of its public duties. It seems to me that the corporation clearly was so acting, for without the Act of Parliament the corporation of Preston would have no authority to act at all.

I am, therefore, of opinion that the first point taken as to the corporation not acting in pursuance of its public duties and authorities is not well founded, and that the Act of 1893 does apply. The result is that the defence set up by the corporation must be held to be, primâ facie, good, namely, that the action ought to have been brought within six months next after the matter complained of.

It is, however, secondly said that even if this be so, still the Act has no retrospective operation, and only applies to actions brought after the Act came into force on January 1, 1894; but in that view I cannot agree, and, in my opinion, that point was correctly dealt with by the learned President in the Court below. The rule applicable to cases of this sort is well stated by Wilde B. in *Wright* v. *Hale* (1), namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only.

VAUGHAN WILLIAMS L.J. I agree, and have no doubt that when the corporation of Preston took upon themselves to decide the question whether a vessel, not necessarily this particular vessel, should or should not go up the river without being lightened, the corporation was performing a statutory duty which is, in their case, regulated partly by the provisions of the special Act of 1883 and partly by the general Act of 1847.

I have no doubt also that the powers thus exercised by the Preston Corporation were the powers conferred by those Acts,

(1) (1860) 6 H. & N. 227, at p. 232.

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and that the corresponding duties were imposed by those Acts. It will be found that under the Act of 1847, if the shipowner, with reference to this very question of lightening, had refused to obey the orders of the harbour authorities, he might be summoned at the police court and fined. It is equally clear that if the corporation, as a harbour authority, had failed in the performance of their duty in respect of allowing vessels to go up the Ribble—as, for instance, giving a preference to one vessel over another—the corporation would be to blame.

I, therefore, think that, as the corporation was acting in the execution of a statutory duty, that the Public Authorities Protection Act, 1893, applies to this case, and that the learned judge in the Court below was right in holding that s. 1 of that Act afforded a good defence.

I also agree that the Act is retrospective, for though, no doubt, the general rule of construction is that "nova constitutio futuris formam imponere debet non praeteritis," it is pointed out in *Moon* v. *Durden* (1) that that rule of construction yields to a sufficiently expressed intention of the Legislature that the enactment shall have a retrospective operation, and there is abundant authority that the presumption against a restrospective construction has no application to enactments which affect only the procedure and practice of the Courts.

ROMER L.J. I agree that the Act of 1893 is retrospective in the sense that it includes an action commenced after the Act, though the action is in respect of a right accrued before the commencement of the Act.

It is clear to my mind that the present action falls within the operation of the Act, for the claim of the plaintiffs is really against the defendants in respect of an alleged default on their part in the execution of their public duty as the authority for the port and harbour of Preston, which includes the river Ribble up to the dock, and the Preston Docks themselves.

I cannot see that the plaintiffs have any real claim outside

(1) 2 Ex. 22.

the operation of the Act, and for that reason the Act is fatal to it.

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*Appeal dismissed.*

Solicitors for appellants (plaintiffs) : *Stokes & Stokes.*

Solicitors for respondents (defendants) : *Bird & Hamer, for Henry Hamer, Town Clerk, Preston.*

T. L. M.

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## IN THE GOODS OF ELIZABETH JANE TRÉFOND.

1899 *May* 15.

*Probate—Practice—Married Woman—Foreign Domicil—Power of Appointment—Will made in Execution of Power—Administration with Will annexed—Grant to Appointee—Limited or General Grant.*

Upon an application for administration with the will annexed it appeared that the deceased was domiciled in France, her husband, who survived her, being a domiciled Frenchman. The applicant was the appointee in trust under the marriage settlement of the deceased, which, on the face of it, appeared to include all her property. The will had not been executed in accordance with the law of the domicil of the deceased :—

*Held*, that unless the husband of the deceased were to consent, a full grant ought not to be made; and that, in accordance with the practice, failing the husband's consent, the grant to the applicant, as appointee, should be limited to such property as the deceased had power to dispose of, and did dispose of, by the instrument executing the appointment.

MOTION for administration with will annexed.

Elizabeth Jane Tréfond died on October 20, 1898, without issue, leaving her lawful husband, Silvain Eugène Tréfond, her surviving. The deceased was domiciled in France, her husband being a domiciled Frenchman, but they had lived apart for some years.

On July 29, 1892, the deceased, who lived in England, made a will in English form, containing a recital that she was entitled in her own right to certain real and personal property under her father's will, which was duly proved in 1873, and that she had a power of appointment under a settlement, made on her marriage in 1876, over certain real and personal estate. By her said will, she gave all her property of whatsoever kind, including all real and personal property over which she had a power of appointment under her father's will and her own

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marriage settlement, to trustees with directions to pay her debts and funeral and testamentary expenses, to provide an annuity of 60*l.* for her husband during the life of her sister Sarah Franklin, and on the death of the latter to pay to her said husband the sum of 500*l.*, and, subject to these provisions, to hold all the residue of her real and personal estate for the benefit of Sarah Franklin, who, along with Alice Mary Marlow, was appointed executrix and trustee.

Under the will of her father, the deceased was entitled, jointly with her sister Sarah Franklin, to an undivided moiety in a certain leasehold messuage, and also to a moiety of income arising out of the rents and profits of certain freehold and leasehold land for her separate use, free from the control and debts of any husband without power of anticipation, and after her death in trust for her issue, and, if she should have no issue, in trust for her, her heirs, executors, administrators, and assigns, and her and their absolute use.

By the marriage settlement of the deceased, all the property to which she was entitled under her late father's will and all the property of which she was possessed at the date of the said marriage settlement, as well as all property which she might thereafter acquire, was, with the assent of her husband, transferred to trustees upon trust to hold the same and to pay the income thereof to the deceased for her separate use during the joint lives of herself and her husband, and, in case she should predecease her said husband, to hold the property in trust for her children, if any; and, if none, upon trust for such person or persons as the deceased should direct and appoint, notwithstanding her coverture, by will or codicil, to be executed in the presence of two or more credible witnesses, which she was thereby empowered to make; and, in default of such direction and appointment, upon trust to transfer the same unto the said Sarah Franklin, if then living, or, if then dead, unto the next of kin of the deceased.

Sarah Franklin died about two months before the deceased, leaving a will and codicil whereby she gave all her property for the sole and separate use of the deceased and independent of all interference and control of the deceased's husband.

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The deceased was appointed executrix in that will, but did not prove it.

Alice Mary Marlow now applied for a general grant of administration with the will of July 29, 1892, of the deceased annexed, as the appointee in trust under the marriage settlement of the deceased, the said will not having been executed in accordance with the law of the deceased's domicil, namely, France.

*Priestley*, for the applicant. Owing to Mrs. Franklin's death, the estate goes to the next of kin and heir-at-law of Mme. Tréfond: there must be administration in Chancery, and the applicant must prove Mrs. Franklin's will, so that all may vest in her. She asks for administration with the will annexed, not as executrix, but as appointee. The will is good, as the exercise of her power of appointment under the will of her father, and it includes all she had, as the whole of her property is caught up by her marriage settlement.

[THE PRESIDENT. Has the husband had notice of this application?]

Not strictly so; but the solicitor for the present applicant holds his retainer, and will cause a separate solicitor to be appointed to represent the husband in the Chancery proceedings which must follow this application. The applicant will give an undertaking to go to the Chancery Division immediately she has obtained a grant here.

[THE PRESIDENT. If you give that undertaking, the grant may go; but it will be limited to such property as the deceased had power to dispose of, and did dispose of.]

No. There is no necessity in this case to say that the grant shall be limited, because all the deceased's after-acquired property was caught up by her marriage settlement, and there is, in fact, no property outside the settlement.

[THE PRESIDENT. Then it will do no harm to limit it.]

[With reference to *In the Goods of Hallyburton* (1) and *In the Goods of Alexander* (2), in neither of those cases was the point put forward that the whole property of the deceased was covered by the will.]

(1) (1866) L. R. 1 P. & M. 90. (2) (1860) 29 L. J. (P. & M.) 93.

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THE PRESIDENT. Those cases were considered in *In the Goods of Huber* (1), and I am told, although it is not so stated in the report, that the grant was limited in that case. Indeed, it would be illogical not to limit it, because the will is only good in so far as it is an execution of the power of appointment, and the applicant is only entitled to a grant at all, on the assumption that the will is a valid execution of the power. There seems to me to be no difficulty in your shewing hereafter, if, as you say, you can shew, that the applicant is entitled to the whole property of the deceased, as being disposed of by the will. If I were to make a general grant, I should be prejudicing the rights of the husband, in case it should turn out, as sometimes happens, that the deceased was entitled to property not covered by the power of appointment; and, in my opinion, to establish a precedent for making a general grant in such cases would not be either logical or proper. But there is a further objection to such a course, namely, that it is not absolutely clear what the effect of appointment by this will may be. In Williams on Executors, 9th ed. vol. ii. p. 1322, n., I find this passage: ". . . . Thus, if a person, having a general power of appointment by will, bequeath the fund, the subject of appointment, to executors in trust, and the trust fails as regards the particular object, the resulting trust will be in favour of the next of kin, or the residuary legatee, as the case may be, of the testator, and not in favour of the persons entitled in default of appointment." Therefore, the effect may be that the property may go to the next of kin. Under these circumstances, and in the absence of a consent by the husband, I must refuse a general grant; and, in that case, the grant I make will be to the applicant as appointee, limited to such property as the deceased had power to dispose of and did dispose of to her by the will; but if the consent of the husband can be obtained, the applicant may take a full grant, either under the 73rd section of the Probate Act, 1857 (20 & 21 Vict. c. 77), or otherwise.

Solicitor: *W. A. Brown.*

(1) [1896] P. 209.

H. D. G.

[IN THE COURT OF APPEAL.]

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*May* 3, 4; *June* 7.

## THE FULHAM.

*Admiralty—Salvage—Jurisdiction—Receiver of Wreck—Detention of Property—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 546, 552.

By s. 546 of the Merchant Shipping Act, 1894, "Where any vessel is . . . . in distress at any place on or near the coasts of the United Kingdom . . . . and services are rendered by any person in assisting that vessel . . . . there shall be payable to the salvor by the owner of the vessel . . . . a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned."

By s. 552, "Where salvage is due to any person under this Act, the receiver shall—(*a*) if the salvage is due in respect of services rendered in assisting any vessel or in saving life therefrom . . . . detain the vessel . . . . until payment is made for salvage or process is issued . . . ."

A British steamship, belonging to the plaintiffs, with cargo from and to a Continental port, was in the English Channel, in distress, for want of fuel, twenty miles off the coast. A British steam-tug towed her into Plymouth, and at the request of the master of the tug, the defendant, receiver of wreck at that port, detained the plaintiffs' vessel two days pending the production of satisfactory bail to answer a claim for salvage.

In an action for damages for the illegal detention of the vessel:—

*Held*, by the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.), affirming the decision of Gorell Barnes J., [1898] P. 206, that the defendant was entitled to judgment in his favour, for the words in s. 552, "salvage . . . . due under this Act," mean "salvage recoverable under this Act," and are not limited by s. 546 in respect of the place where the vessel was in distress; so that a dispute as to salvage having arisen, to be determined by a court recognised by the Act, the defendant, as receiver, had jurisdiction to detain the property which was in his district, and liable for salvage.

*Per* Gorell Barnes J. *Semble*, that the words "near the coasts of the United Kingdom" in s. 546 are restricted to the territorial limit.

APPEAL by plaintiffs, the Britain Steamship Company, Limited, owners of the *Fulham*, against a decision of Gorell Barnes J. (1) in favour of the defendant, Thomas Hudson, receiver of wreck and collector of customs at Plymouth.

The question turned on the meaning of the words "salvage

(1) [1898] P. 206.

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. . . . due under this Act" in s. 552 of the Merchant Shipping Act, 1894. (1)

The material facts were shortly as follows:—

On December 14, 1897, the British steamship *Fulham*, of the port of London, whilst on a voyage from Sulina to Dunkirk with a cargo of barley, ran short of fuel. On December 16, when in the English Channel, about twenty miles off Plymouth, she was taken in tow by the steam-tug *Flying Buzzard*, and, on the same day, brought into Plymouth.

At the request of the master of the *Flying Buzzard*, the defendant, acting under the authority of sub-s. 2 of s. 552 of the Act of 1894 (1), detained the *Fulham* by placing a man on board of her; and it was alleged that, on December 18, the defendant refused to accept bail tendered by the agents of the plaintiffs, and also refused to accept an undertaking for bail subsequently offered by the solicitors of the plaintiffs.

On December 20, the owners, master, and crew of the *Flying Buzzard* issued a writ in a salvage action in the Probate, Divorce and Admiralty Division (Admiralty) of the High Court of Justice against the owners of the *Fulham*, her cargo and freight; and on the same day security was given by the plaintiffs to the satisfaction of the defendant, who thereupon released the vessel.

At the trial of the present action before Gorell Barnes J. on June 10, 1898, it was contended by the plaintiffs:—

First, that the arrest and detention of the *Fulham* by the defendant was illegal on the ground that he had no jurisdiction under s. 552 (1) of the Act, as the vessel was twenty miles off

(1) 57 & 58 Vict. c. 60, s. 552: "(1.) Where salvage is due to any person under this Act the receiver shall—

"(*a*) if the salvage is due in respect of services rendered in assisting any vessel or in saving life therefrom, or in saving the cargo or apparel thereof, detain the vessel and cargo or apparel; and

"(*b*) if the salvage is due in respect of the saving of any wreck, and the wreck is not sold as unclaimed under the Act, detain the wreck.

"(2.) Subject as hereinafter mentioned, the receiver shall detain the vessel and the cargo and apparel or the wreck (hereinafter referred to as detained property) until payment is made for salvage, or process is issued for the arrest or detention thereof by some competent Court.

"(3.) A receiver may release any detained property if security is given to his satisfaction . . . ."

the coast, and, therefore, not in distress "on or near the coasts of the United Kingdom" within the meaning of s. 546 of the Act. (1)

Secondly, that the defendant had improperly refused to accept bail; but on this point, the facts of which are set out in the report in the Court below (2), the plaintiffs did not appeal.

On the question of law involved in the first point Gorell Barnes J., on July 7, delivered a considered judgment reviewing the sections of the Merchant Shipping Act, 1894, relating to salvage, and holding that the defendant had jurisdiction to detain the vessel on the ground that the words "due under this Act" in s. 552 did not limit his jurisdiction in the way contended, as the words covered "any salvage which the Act contemplates being awarded by the Courts mentioned in it, the jurisdiction of which is conferred or recognised by it," and with reference to the question of jurisdiction under ss. 544 (3) or 546 the learned judge said: "Two other points were taken by counsel for the defendant. The first was that in any view

(1) 57 & 58 Vict. c. 60, s. 546: "Where any vessel is wrecked, stranded, or in distress at any place on or near the coasts of the United Kingdom or any tidal water within the limits of the United Kingdom, and services are rendered by any person in assisting that vessel or saving the cargo or apparel of that vessel or any part thereof, and where services are rendered by any person other than a receiver in saving any wreck, there shall be payable to the salvor by the owner of the vessel, cargo, apparel, or wreck, a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned."

(2) [1898] P. 206, at pp. 208, 209.

(3) 57 & 58 Vict. c. 60, s. 544: "(1.) Where services are rendered wholly or in part within British waters, in saving life from any British or foreign vessel, or elsewhere in saving life from any British vessel, there shall be payable to the salvor by the owner of the vessel, cargo, or apparel saved, a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned.

"(2.) Salvage in respect of the preservation of life when payable by the owners of the vessel shall be payable in priority to all other claims for salvage.

"(3.) Where the vessel, cargo, and apparel are destroyed, or the value thereof is insufficient, after payment of the actual expenses incurred to pay the amount of salvage payable in respect of the preservation of life, the Board of Trade may, in their discretion, award to the salvor, out of the mercantile marine fund such sum as they think fit in whole or part satisfaction of any amount of salvage so left unpaid."

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of the case the defendant was entitled to detain the vessel because the services in question had been rendered partly in saving life.

"The *Fulham* was in a position in which there would be some risk to the lives of those on board her. In the salvage suit against her and her cargo and freight, which was heard by me, an award of 900*l.* was given to the salvors for bringing her into Plymouth, and I found, on the advice of the Elder Brethren who assisted me, that there was risk of her going ashore and being lost. So that, as there was some risk of life, which would form an element in considering an award on a claim substantially made for saving the property, it cannot be said that the defendant had no jurisdiction whatever to detain the vessel. The plaintiffs' counsel made no effective answer to this point.

"The other point was that the *Fulham* was in distress at a place 'on or near the coasts of the United Kingdom,' because she was, it was contended, 'near' the coasts within the meaning of s. 546, and also because part of the assistance rendered to her was rendered within the three-mile limit as she was towed into Plymouth.

"I cannot, however, read the words 'near the coasts' as covering a place twenty miles off the coasts. The same language is to be found in other sections, particularly ss. 511 and 535; and I am of opinion that when the terms of these sections are considered the words 'near the coasts' do not apply to such a case as that before me. Some limit must be placed on the term, and, having regard to all the sections dealing with wreck and salvage, as at present advised, I think the limit should be the territorial limit, though it is not necessary in this case to express a final opinion upon the point.

"Nor is it necessary to decide whether s. 546 would apply because part of the service was rendered within the territorial limit. It is, in my opinion, extremely doubtful whether the section could be made to apply on this ground to the facts of this case."

The owners of the *Fulham* appealed.

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May 3, 4. *Robson*, *Q.C.*, and *J. A. Hamilton*, for the appellants (plaintiffs).

The detention of the *Fulham* by the defendant was illegal, as he had no jurisdiction under the Merchant Shipping Act, 1894, over this vessel. The arrest was made under s. 552 of the Act, and the learned judge in the Court below has read that section as if it gave jurisdiction to the receiver in all cases of salvage, but the power of this departmental officer, exercisable before process, is carefully limited by the section to cases of "salvage due under this Act." These cases are to be found in ss. 544, 545, and 546, grouped under the head of "Salvage." Sect. 544 does not apply, as it deals only with salvage payable for saving life, and the basis of the present claim is for saving property. Sect. 545 does not apply because it relates only to the salvage of life from foreign vessels beyond the jurisdiction, and s. 546 is, therefore, the only section under which the defendant, as receiver of wreck, could claim to exercise jurisdiction, but in order to come within that section the vessel must be "in distress on or near the coasts of the United Kingdom," which was not the case here, as the vessel was twenty miles off the coast when she was in distress for want of fuel and the right to salvage accrued. After she was taken hold of by the tug and came within the three-mile limit she was no longer in distress. The learned judge in the Court below has intimated his opinion that these words in the section cannot be extended beyond the territorial limit, and in *The Leda* (1), decided on the section (458) of the Merchant Shipping Act, 1854, from which s. 546 of the Act of 1894 is taken, it was held that the services must have been rendered within three miles of the shore.

It is clear also from the nature of the duties cast upon a receiver by s. 511 of the Act in the case of a vessel in distress that the words "on or near the coasts," which are repeated in that section, must mean "close to" the coast, because, otherwise, it would be impracticable for the receiver to "forthwith proceed there" and "take the command of all persons present."

(1) (1856) Sw. 40.

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*Sir Robert B. Finlay, S.-G.*, and *Sutton*, for the respondent (defendant). The Legislature has provided an officer on the spot to do what, if he were not there, the salvor in possession might himself do—that is, detain the salved property until satisfactory security is forthcoming: see *Hartfort* v. *Jones*. (1) In other words, the object of the sections of the Merchant Shipping Act, 1894, dealing with the powers of the receiver in respect of salvage claims, is to provide a peaceful means of detaining the vessel until the proper tribunal can be set in motion for the purpose of recovering the salvage payable for services rendered. The limitation proposed to be put by the appellants upon the words in s. 552 would render the Act incapable of being worked; for it would involve the receiver each time in a difficult inquiry, with the risk of an action against him if it should turn out that the case did not fall within ss. 544, 545, or 546 of the Act.

If the Legislature intended the word "near" to mean within the three-mile limit, it would have been easy to have said so, but an elastic term was purposely used so as to enable the receiver to promptly exercise his authority within such a distance as would come within his personal cognizance.

The words "on or near the coasts" are also used in s. 519, and, if the contention of the appellants is to hold good, the receiver would not be justified in taking delivery of cargo or other articles belonging to a vessel in distress, unless that vessel was within the three-mile limit, the effect of which would be that the protection of property would become very difficult, as the receiver would be unwilling to incur the responsibility of making any mistake as to the exact distance the vessel was from the shore.

Secondly. The vessel was in distress within the three-mile limit, as she was still in distress whilst being towed into Plymouth, the salvage being one continuous act on the part of the salvor.

Thirdly, in any view, the receiver had jurisdiction, as the case is within s. 544, for salvage is there expressly made payable for saving life from a British vessel, not only where the "services

(1) (1699) 1 Ld. Raym. 393.

are rendered wholly or in part within British waters," but "elsewhere," and it is stated by Gorell Barnes J. in his judgment (1) that the risk of life was an element taken into consideration by him in fixing the amount of the award to the salvors. The case of *The Pacific* (2) also shews that services will be deemed "in part within British waters," within the meaning of this section, if the life salvage ends at a port within the United Kingdom although it commenced ninety miles off the coast. In the judgment in that case it is pointed out that, in consequence of the hardship resulting from the decision of Dr. Lushington in *The Johannes* (3), the Legislature modified by s. 9 of the Admiralty Court Act, 1861, the wording of s. 458 of the Merchant Shipping Act, 1854, and both these sections are now included in the section in question; so that the point for consideration now is, not whether the ship in distress was outside the limits of the United Kingdom, but "whether the salving vessel in the course of effecting the salvage service is within British waters." (4) It must also be observed that the heading to the part of the Act of 1894 under discussion is "salvage," whereas the heading of the corresponding part of the repealed Act of 1854 was "salvage in the United Kingdom," shewing an intention to extend the jurisdiction in respect of the subject-matter included under the heading.

*Hamilton*, in reply. In order that the jurisdiction of the receiver of wreck may arise, two things must concur, namely, the vessel must be "in distress," and, secondly, she must be in distress "on or near the coasts," but in the present case the vessel was no longer in distress after she was taken in tow twenty miles off the coast. Steam-vessels are constantly towed round from one port to another without coals, under a towage contract, and are not deemed to be in distress so as to give rise to a salvage claim because the coals and the motive power are, for the time being, in the towing vessel and not in the vessel towed.

(1) Ante, p. 254.
(2) [1898] P. 170.
(3) (1860) Lush. 182.
(4) *The Pacific*, [1898] P. 170, at p. 175.

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After the vessel was taken in tow she was not in distress so as to be entitled to make the distress signals prescribed by art. 31 of the Regulations for Preventing Collisions at Sea, and, if she had, her owners would have rendered themselves liable, under s. 434 of the Merchant Shipping Act, 1894, to pay compensation to those who came off to her in consequence of such improper signals.

If the contention of the respondent is to prevail, then, if the vessel was in distress within three miles of the French coast, she would still be within his jurisdiction as receiver of wreck at Plymouth.

The case does not fall within s. 544, for no lives were saved "from" the vessel; the amount of the award for salving the property was simply enhanced in order to cover any possible danger to life.

[The following cases were referred to: *The Lady Katherine Barham* (1); *The Mac* (2); *The Renpor* (3); *Nourse* v. *Liverpool Sailing Ship, &c., Association.* (4) In addition to the sections of the statutes already set out the following were referred to: ss. 434, 460, 511, 513, 547, 551, 567, and Sched. XX. of the Merchant Shipping Act, 1894, with the corresponding repealed sections of the Acts of 1854 and 1862; ss. 19 and 21 of the Act for Consolidating and Amending the Laws relating to Wreck and Salvage, 1846 (9 & 10 Vict. c. 99); s. 22 of the County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 Vict. c. 71).]

*Cur. adv. vult.*

June 7. A. L. SMITH L.J. This is an action brought in the Admiralty Division of the High Court of Justice by the owners of the British steamship *Fulham* against the receiver of wreck and collector of customs at the port of Plymouth to recover damages for his having detained the plaintiffs' ship.

Two causes of action are set up, the first being that the

(1) (1861) Lush. 404.
(2) (1882) 7 P. D. 38, 126.
(3) (1883) 8 P. D. 115.
(4) [1896] 2 Q. B. 16.

defendant had been guilty of what is called in the pleadings a gross dereliction of duty in detaining as he did the plaintiffs' ship, and the second being that the defendant had no jurisdiction at all to detain the plaintiffs' ship.

The first cause of action is traversed by the defendant, and the second the defendant justifies under s. 552 of the Merchant Shipping Act, 1894, and as to what is the true construction of this section is the paramount question in this case, though others have been debated.

As to the first cause of action, Gorell Barnes J. has found in favour of the defendant, and the plaintiffs do not appeal as to this. As regards the justification pleaded under s. 552 of the Act of 1894, the learned judge has also found in favour of the defendant, and it is against this that the plaintiffs appeal.

The question is peculiarly short in itself, and is, What is the true rendering of the words in s. 552 of the Merchant Shipping Act, 1894, "where salvage is due to any person under this Act?" It is said on behalf of the plaintiffs that the words are limited to cases which come within either s. 544 or s. 546 of the Act, and that it is only in such cases that the receiver of wreck has jurisdiction to detain a ship alleged to be liable to a salvage claim under s. 552 of the Act. It was argued that s. 544 does not apply to the present case, because there was no salvage recoverable for saving life, and that s. 546, which relates to salvage of property, does not apply because the steamship *Fulham* was not in distress at any place "on or near the coasts of the United Kingdom," though she was in the port of Plymouth when the claim was made by the salvors for salvage services rendered to her.

I desire to say that I protest against being taken through the Wreck and Salvage Act, 1846, and the Merchant Shipping Acts, 1854, 1861, and 1862, in order to put a construction upon a few words in the great consolidating Act of 1894, with its 748 sections and twenty-two schedules, in the last of which no less than forty-eight prior Acts have been wholly or in part repealed. If this is to be the means by which a consolidating statute, such as that of 1894, is to be construed, it would be far

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better that the Legislature should not attempt to codify the law at all, for suitors and the Court would then be spared the trouble of having also to interpret an additional Act. In the Act of 1894 new groups of sections, with new headings, are inserted. Old sections are placed in new contexts, different phraseology is at times used, and, for myself, I decline to embark upon the inquiry as to why or wherefore the Act of 1894 differs from the prior Acts, in themselves differing with each other, and I apply myself to what the Legislature has enacted to be the law when it passed the Merchant Shipping Act, 1894.

The facts are these. The plaintiffs' ship, the *Fulham*, was in distress some twenty miles off Plymouth, being short of coal. The owners of the tug *Flying Buzzard*, being apprised of this fact, sent out their tug from Plymouth to her assistance, and the tug brought the *Fulham* safely into Plymouth, which is in the defendant's district. Gorell Barnes J., assisted by two of the Elder Brethren, in a salvage suit brought by the owners of the tug against the owners of the steamship *Fulham*, found that there had been a risk, when the tug took the *Fulham* in tow, of the steamship going ashore and being lost, and that there was some risk of life, and he awarded the sum of 900*l.* for the salvage services rendered. The learned judge, in his judgment now under appeal, says (1) the risk of life would form an element in considering the claim, though it was substantially a claim for saving property.

With these facts I come to s. 552. That the present is a case arising out of a salvage service, and a dispute relating thereto, is clear; and it is in relation to a dispute about this service that the receiver of wreck at Plymouth detained the *Fulham*, which detention is now complained of. The Act of 1894 is conveniently divided, as many Acts are, into different parts, each part containing groups of sections with their respective headings and sub-headings. I turn to Part IX. of the Act, which is headed "Wreck and Salvage," for this is the part of the Act I have to consider. I pass over those sections in this part which do not relate to salvage, and

(1) Ante, p. 254.

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are under the sub-headings "Vessels in Distress," "Dealing with Wreck," "Unclaimed Wreck," "Removal of Wrecks," "Offences in respect of Wreck," "Marine Store Dealers," and "Marking of Anchors," until I come to ss. 544, 545, and 546, under the sub-heading "Salvage." Sect. 544 relates to salvage for saving life. Sect. 545 I will leave out; it is not material. Sect. 546 relates to salvage of cargo or wreck—that is, salvage of property where the vessel is wrecked, stranded, or in distress on or near the coasts of the United Kingdom. No duty is imposed upon the receiver of wreck by these sections. They deal with the salvage which may be recovered for salvage services rendered to life or property. Next comes the sub-heading "Procedure in Salvage," with its group of sections. This is the important group as regards the present case. Sects. 547, 548, 549, and 550 all deal with the procedure which is to take place when disputes arise as to the salvage to be paid for salvage services rendered.

It is perfectly clear that the salvage services about which these disputes may arise are in no way limited to salvage services on or near the coasts of the United Kingdom, for these sections embrace disputes as to salvage, wherever the services may have been rendered. These disputes may be settled either summarily or by the High Court, and all disputes not summarily adjudicated upon, according to the provisions of the Act, are to be determined by the High Court.

I now come in this group of sections under "Procedure in Salvage" to s. 551, which deals with the valuation of property by a receiver of wreck, when a dispute as to salvage arises and the res salved is in the district of the receiver. This section enacts that "where any dispute as to salvage"—which clearly means as to any salvage no matter where the salvage services have been rendered—"arises, the receiver of the district where the property is in respect of which the salvage claim is made, may, on the application of either party, appoint a valuer to value that property, and shall give copies of the valuation to both parties." That the receiver of wreck at Plymouth had jurisdiction under this section of the Act to appoint a valuer—who would go on board to value the property salved—at the

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instance of the salvors, even against the will of the shipowner, is, to me, clear, and I did not hear the contrary contended for at the bar on behalf of the plaintiffs. Whether the dispute arises as to life salvage, or as to salvage of property no matter where the services have been rendered, this jurisdiction is conferred upon the receiver, and it is not confined to the case of a vessel in distress on or near the coasts of the United Kingdom, and as regards this jurisdiction there is no limit, excepting that the property salved must be in the district of the receiver.

But it is said that the next section in this group, namely, s. 552, only confers upon the receiver of wreck a limited jurisdiction, and that he has no jurisdiction to detain a vessel, in the case of a claim being made for salvage rendered to the ship which is then within his jurisdiction, until payment of the claim, or process be issued for the arrest and detention of the vessel by some competent Court as is provided for by this section, unless it be a claim for life salvage under s. 544, or the vessel was in distress on or near the coasts under s. 546. This argument is based solely upon the words in s. 552, "where salvage is due to any person under this Act."

I do not agree with this contention, and for these reasons. First of all, what is the meaning of the words "salvage due under this Act"? I do not deny that they may mean money which is due and then payable for salvage services. But is this their real meaning in this section? Where can be found in either ss. 544 or 546, or indeed in any section of the Act, provision that money is due and then payable for salvage services rendered? It cannot be found. No salvage is due and then payable under either of the two sections, or any other section in the Act. It is clear to me that the true reading of the words "salvage due under this Act" is not that the money should be actually due, and surely this s. 552 is not to be deleted from the statute, which, if the meaning contended for is to be attached to the words, would be the case. In my judgment the word "due" in this section means recoverable under the Act. I think this is supported by the words in sub-s. 3 of s. 552, "if the claim for salvage exceeds 200*l.*"; and at the

beginning of the section the words are "under this Act," and not "under ss. 544 and 546," or even "under the previous provisions of this Act." One finds in the Act how moneys payable for salvage services, whether for life or property, may be recovered under the Act. See as to this especially s. 565. I fail to see why a claim under s. 565 is not a claim for salvage under s. 552. In my judgment, therefore, s. 552 is not limited to ss. 544 and 546, as contended for by the learned counsel for the appellants.

I am fully aware that the side-notes of a section form no part of the Act, but, having considered the Act, I cannot put in terser language what I hold to be the meaning of s. 552 than what I find in its side-note, "Detention of property liable for salvage by a receiver." I believe this to be an accurate rendering of the section.

In my opinion the receiver of wreck had jurisdiction to detain the plaintiff's ship as he did, and I think that Gorell Barnes J. was right in the conclusion he arrived at as to the true construction of this section. What the Solicitor-General said about the Legislature placing the receiver of wreck in the shoes of the salvor, who was entitled to a lien upon the property salved (*Hartfort* v. *Jones* (1)) struck me as well worthy of consideration, but I do not need this to bring me to the conclusion I have arrived at; and I may add that I cannot see any sense in what the appellants contend for, namely, that although a receiver of wreck may detain a ship in the case of a dispute about salvage services, no matter where rendered, if the ship was in distress on or near the coast, yet he has no jurisdiction if the same dispute arises and the ship was not in distress on or near the coast and yet is within his district.

As regards the subsidiary points, namely, whether life salvage had in fact been rendered, and the meaning of "on or near the coasts," so much debated at the bar, I say nothing. In the view I take of this case these questions do not arise, and if I said anything about them my observations would be purely obiter. For the reasons above stated, in my judgment, this appeal should be dismissed with costs.

(1) 1 Ld. Raym. 393.

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VAUGHAN WILLIAMS L.J. I agree, but despite the argument based on the words "due under this Act" I cannot get out of the words of s. 552.

I thought it my duty to examine the words carefully, because the construction we have arrived at leads to a somewhat strong result, namely, that there may be in effect an arrest on mesne process by the receiver on a mere claim of salvage in a case in which the receiver may have no personal knowledge of the circumstances, and I am not sure that the receiver has any discretion if a claim is made. The word used is "shall." The power or jurisdiction in such circumstances is certainly new.

ROMER L.J. concurred.

*Appeal dismissed.*

Solicitors for appellants (plaintiffs): *Holman, Birdwood & Co.*

Solicitor for respondent (defendant): *Solicitor to the Board of Trade.*

T. L. M.

## In the Goods of CHARLES POTTER.
## POTTER *v.* POTTER.

1899
*June* 12, 19.

*Probate—Administration with Will annexed—Probate Act*, 1857 (20 & 21 *Vict.* c. 77), s. 73—"*Special Circumstances*"—*Grant to Stranger.*

Where all parties interested in the estate of the deceased had entered into a compromise, with a view to putting an end to all further disputes and litigation, upon the basis that B., a stranger in blood, who had been employed by the deceased in auditing his accounts, should apply for and obtain a grant of letters of administration with the will and codicils annexed, the Court, upon his application, and subject to the consents of all the persons interested in the estate, and subject to an affidavit of the fitness of the proposed administrator being filed, made the grant to him under s. 73.

Motion for a grant of administration with will annexed to a stranger.

The deceased, Charles Potter, late of Croydon, died on February 10, 1898, leaving three documents of a testamentary nature, these being in fact instructions for a will and two codicils, all duly executed in accordance with the Wills Act (1 Vict. c. 26).

Of the executors named in those documents, one predeceased the testator, and the other renounced probate.

The deceased left a widow and six children (three sons and three daughters), each sui juris, him surviving.

Henry William Potter, one of the sons, entered a caveat, and on March 23, 1898, three of the other children issued a writ against him, claiming that the Court should pronounce for the will and two codicils in solemn form.

On April 4, 1898, Ambrose William Boughton, an accountant, who had been employed by the deceased in auditing his accounts, was appointed administrator and receiver pending suit.

After protracted negotiations, a deed of family arrangement was entered into on March 21, 1899, whereby it was agreed, inter alia, between all the children and the widow that administration with the will and codicils annexed should be applied for and taken out by the said Ambrose William Boughton.

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Pursuant to this arrangement, Mr. Boughton now moved that the contentious proceedings might be stayed; that letters of administration with the will and two codicils annexed might be granted to him under s. 73 of the Probate Act, 1857 (20 & 21 Vict. c. 77); that the terms agreed upon, as contained in the indenture dated March 21, 1899, might be filed, and, if necessary, made a rule of Court; and for such further and other order as to the Court might seem fit.

*Barnard*, for the applicant. The parties interested would not consent to any one of their number taking the grant; but they all consent to the applicant. There is authority for a grant being made to a stranger, though there have also been cases in which such a grant has been refused. The applicant relies on *Farrell* v. *Brownbill* (1), which is very similar to, though not absolutely identical with, the present case. In that case reference was made to an earlier decision of *In the Goods of Holroyd*. (2)

[GORELL BARNES J. *Farrell* v. *Brownbill* (1) was explained by Lord Penzance in *Teague* v. *Wharton*. (3)]

There was no litigation in that case, and it does not overrule *Farrell* v. *Brownbill*. (1)

[GORELL BARNES J. Sir James Hannen refused, in the case of *In the Goods of Hale* (4), to do what you are now asking me to do.]

*R. H. Pritchard*, for the defendant, supported the application.

*Durley Grazebrook* (*R. F. Colam* with him), on behalf of the widow and all the children of the deceased, other than the defendant, also supported the application upon the ground that there was no other way of avoiding further litigation, and all parties interested, either under an intestacy or under the will and codicils, were most anxious to see the compromise carried out.

*Cur. adv. vult.*

(1) (1864) 3 Sw. & Tr. 467.
(2) April, 1858. Unreported.
(3) (1871) L. R. 2 P. & M. 360, 361.
(4) (1874) L. R. 3 P. & M. 207.

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June 19. GORELL BARNES J. There are "special circumstances," I think, in this case which bring it within the purview of s. 73, and which justify me in acceding to the application. Partly on account of the litigation, which it is desired by all parties interested in the estate to put an end to, and partly also on account of the position of the applicant in relation to the estate, I make the grant to him under the 73rd section, subject to consents of the widow and all the parties interested and an affidavit of fitness of the proposed administrator being filed.

Solicitors for applicant: *Edridge & Newnham.*
Solicitors for defendant: *Simpson, Cullingford & Co.*
Solicitors for other persons interested: *Edridge & Newnham.*

H. D. G.

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## IN THE GOODS OF WHITELEGG.

1899
*May* 15.

*Administration with Will annexed—Executors—Powers and Duties—Law of Chili—Evidence—Grant to Widow.*

A testator died domiciled in Chili, leaving a will, appointing two executors, one of whom died without taking probate. The other was believed to be in Bolivia, but no response had been obtained to repeated applications made to him. The only property in this country of any value consisted of a debt which it was desired to collect.

The Court accepted the affidavit of a notary, who was not a qualified Chilian lawyer, as evidence of the law of Chili; and, upon his evidence that the powers and duties of an executor in that country would only extend to seeing that the estate was duly administered by the acting heiress, who in this case was the testator's widow, the Court made to her a grant of administration, with the will annexed.

MOTION for administration with will annexed.

The testator, Thomas Davies Whitelegg, died on September 20, 1896, at San Patricio, Province of Tarapacà, in the Republic of Chili, domiciled in Chili, leaving Maria Luisa Whitelegg, his lawful widow and relict, and five children him surviving.

By his will, dated June 1, 1885, he appointed Thomas Burdus, of Tacua, Chili, and Arthur Whitfield Whitelegg, one of his

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brothers, to be his executors. The latter died without proving. The former was believed to be in Bolivia, but, although repeated applications had been made and forms sent to him to sign, he had made no response whatever.

The only available property of the deceased in this country consisted of a debt of 3692*l.* 15*s.* due from a relative resident here.

The affidavit of Horatio Arthur E. de Pinna as to the law and effect of the will in Chili stated that he had, as notary public, had extensive practice for many years in the law of the South American Republics generally and of Chili in particular, and that he was accustomed to prepare deeds and documents according to the law and practice of those Republics and in the Spanish language; that he was acquainted with the will in question, and, as notary public, prepared the translation thereof (produced) and signed the certificate authenticating such translation; that the document in Spanish, forming part of the exhibit to his affidavit, was an officially authenticated copy of the will of the testator, so translated as aforesaid, as officially recognised by order of a judge of the Court in Chili, in accordance with the law and practice prevailing in that Republic, and it was the only document issued there on approval of a will. According to the law of Chili, the heirs of the testator were his widow and children, and the heirs were entitled to represent him and to administer his estate. The children being under age (i.e., under twenty-five) the widow was their guardian and entitled to represent them fully; and, accordingly, she was during their minority the sole acting heir of the testator. Executors in Chili were appointed principally for the purpose of avoiding official interference in the administration of the estate, their duty being to see that the administration was being properly conducted, and they had no powers or authority apart from the heirs. The receipt for a debt, such as that said to be due from Mr. James Whitelegg to the deceased, and in respect of which administration was now sought, could in Chili be properly given by the widow, as heir and representative of the minor heirs.

The deponent went on to state that he prepared the powers

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of attorney which empowered the sale and general dealing with the testator's property, and that such powers were, as the deponent believed, successively acted upon without the concurrence of the executors of the testator, and that this was done in the regular course, in accordance with the law and practice prevailing in Chili.

The deponent further stated that the ganancial property (los gananciales) of the widow, the deducting of which was mentioned in the will, referred to the widow's right to one-half of all the property of the testator acquired during the marriage; and, accordingly, in this case the widow was entitled, under Chilian law, to one-half of the proceeds of the debt due to the deceased from James Whitelegg.

*Priestley* moved for a grant of administration, with the will annexed, to the widow. The will has been established in Chili by a process which would seem to be equivalent to the proof of a will here. It was opened in the presence of a judge, who ordered it to be copied and certified. This was done by a gentleman appointed by the Court in Chili to perform these official acts, and, as soon as it was seen that the will named two executors, that gentleman became functus officio. Then the widow sent out powers of attorney to deal with the estate in Chili, and the affidavit of Mr. de Pinna, who is a solicitor practising in this country, states what the law of Chili is, and it is submitted, establishes the right of the widow to a grant in respect of the property here.

[THE PRESIDENT. I ought to have an affidavit by some gentleman who has actually practised in the Courts of Chili. All that Mr. de Pinna says is that he has experience of the laws of Chili. Can I accept the affidavit of a notary public as evidence of the law of a foreign State? It is a question of practice.]

It may be difficult to find a Chilian lawyer in this country. The executor has not been heard of for more than a year, and great injury may be done to the estate, if representation to the estate in this country is to be delayed, owing to his silence.

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THE PRESIDENT. I think I may accede to your application. It is my duty to follow the law of the testator's domicil, and, under the circumstances, although I have some little hesitation about it, I will accept the affidavit of the notary public, with the qualification which he possesses, as proving the state and effect of the law of that domicil. According to the affidavit, the widow is the person entitled to administer the deceased's estate, and I therefore grant letters of administration with the will annexed.

Solicitors: *Gard, Hall & Rook.*

H. D. G.

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1899
*July* 3.

## IN THE GOODS OF MARY MASSEY.

*Administration—Will—Disappearance of Person named as Executor—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73—*Substantial Estate—Grant to one of the Residuary Legatees.*

The executor named in a will took some steps towards obtaining probate, but, after drawing a sum of 25*l.* from the estate on account of costs, appeared to have departed from the country in embarrassed circumstances, leaving no address, and apparently with no intention of returning:—

*Held* (all parties interested under the will consenting), that, although the estate was of substantial value, administration with the will annexed might be granted, upon motion, under s. 73, to one of the persons named as residuary legatees without notice to the executor.

MARY MASSEY, the testatrix, died on October 25, 1898, leaving a duly executed will dated June 6, 1890, whereby she appointed John Murray and William Wells to be her executors.

She left personalty of the value of about 2000*l.*, and by her will she gave the residue to her sons Albert Edward Massey and David William Massey, as tenants in common.

William Wells, one of the executors, who was also a solicitor, prepared and was sworn to the usual affidavits for obtaining probate, and, in December, 1898, he sent the papers to his stationer in London, but the affidavit for inland revenue being on a wrong form, the stationer returned the papers for amendment. Mr. Wells took no further step in the

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matter, except that he drew 25*l.* from the assets on account of expenses, and on February 18, 1899, he sailed with his family from Southampton, bound for New York.

He was believed to be in financial difficulties at the time, and he left no address where communications might reach him.

On May 12, 1899, John Murray, the other person named as executor, renounced probate.

Albert Edward Massey, one of the sons and a residuary legatee, now applied for administration with the will annexed. The estate was stated to be worth about 2000*l.*

Among the affidavits was one by a former clerk of William Wells, to the effect that the latter told him, before leaving, that he was going to Southampton.

*Middleton* (*Lipscomb* with him) moved for a grant to the applicant. The executor must be taken to have left this country with no intention of returning. All parties interested under the will consent to the grant applied for. *In the Goods of Cooper* (1) is an authority for such an application. Although the Court appears to have been guided, in that case, by the smallness of the estate, this is only one of the elements to be considered. In the later decision, *In the Goods of Crawshay* (2), there is nothing in the report to shew that the estate was small.

GORELL BARNES J. granted the application.

Solicitor: *A. M. M. Forbes, for Frank Beal, St. Albans.*

(1) (1869) L. R. 2 P. & M. 21. (2) [1893] P. 108.

H. D. G.

1899
*July* 24.

## In the Goods of HANNAH APTED.

*Probate—Practice—Lost Will—Small Estate—Proof on Motion—Consent of Next of Kin dispensed with.*

The Court will now, in the case of a small estate, entertain an application to prove, upon motion, the contents of a lost will, without requiring, as an absolute condition, the consent of all persons interested in the estate.

*In the Goods of Pearson*, [1896] P. 289, qualified.

Motion for administration, with copy of lost will annexed.

Hannah Apted died on January 27, 1899, having duly made and executed her will on November 26, 1864, whereby she appointed her sister, Ann Apted, sole executrix and residuary legatee.

The said Hannah Apted died a spinster, without parent or grandparent, but leaving her surviving one brother and four sisters (one since deceased), and also Thomas Apted, the eldest son of her elder brother, and three children of a deceased sister.

Ann Apted, the sister, did not take probate and died on March 9, 1899, leaving a duly executed will bearing date February 19, 1890, appointing her niece, Ann Apted, universal legatee and sole executrix. The latter in due course proved this will on April 27, 1899.

The original will of Hannah Apted was lost or mislaid by the present applicant, Ann Apted, on June, 9, 1899, but a copy thereof had been made by her solicitor since the death of Hannah Apted.

The personal estate of the said Hannah Apted was stated to be of the value of 5*l.* 2*s.* 6*d.*, and the real estate of the value of 191*l.* 2*s.* 6*d.*

In reference to the efforts which had been made to obtain the consents of the next of kin and heir-at-law, Mr. Robert Samuel Tredgold, the solicitor, stated that on July 14, 1899, he sent by registered post to the brother and each of the sisters of the deceased, namely, John Apted, Lucy Apted, Mrs. Boxall,

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and Mrs. Wealthy, a letter signed by himself, which, omitting formal parts, was as follows: "The will of your late sister Hannah Apted, which was duly executed, has been lost or mislaid. A copy of this will has been lodged at the principal Registry of the Probate Court, and it is intended to make an application to the Court on Monday the 24th July instant for a grant to Ann Apted (the niece of the said deceased) of administration with the said copy will annexed, until the original will shall be brought in. Counsel (with a view of saving expense) has advised that this application might, under the circumstances, be made by motion. If you assent to this mode of procedure, kindly signify your assent by writing across the face of this letter: 'I assent,' and then post it to me in the enclosed envelope. If you desire the more expensive course of propounding the will in solemn form, write across the face of this letter: 'I object to the motion.' I may here say that, even if there were no will, there would be nothing of any value to divide among the next of kin, and deceased's share in Spring Cottage would, in that event, go to her heir-at-law, Mr. Thomas Apted."

The solicitor also, on July 18, 1899, sent by registered post to each of the children of the late Elizabeth Best, a sister of the deceased, who had died in the lifetime of the deceased, namely, George Best, Mrs. Walker and Mrs. Greives, a letter in exactly identical terms with the letter he sent to the brothers and sisters of the deceased, save that in the first clause thereof the word "aunt" was substituted for the word "sister."

John Apted, Lucy Apted, and George Best respectively signified their assent in the manner suggested in Mr. Tredgold's letter. Mrs. Boxall replied by letter, which, omitting formal parts, read thus: "On receipt of your letter of the 14th July, and considering that I have no personal interest in the will, I decline to sign either way."

Mrs. Wealthy replied that she declined to do anything as regards her late sister's will. Mrs. Walker replied that she declined signing either way. Mrs. Greives replied also to the same effect.

The solicitor further stated that the foregoing replies from

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Mrs. Wealthy, Mrs. Walker, and Mrs. Greives were received by him on July 20 inst. He also gave notice by letter to Thomas Apted, the heir-at-law, and communicated with him through Messrs. Faithfull & Owen, his solicitors, who replied by letter, saying that they did not think there was any necessity for Mr. Tredgold to give Mr. Apted notice of the application on the 24th instant, as they had already given him notice, acting on his behalf.

*Bayford* moved that a grant of letters of administration, with the copy of Hannah Apted's will annexed, be granted to Ann Apted, the applicant, without requiring the consents of the next of kin. It would cost more than the estate is worth to cite the next of kin, who would get nothing in any event. In the case of *In the Goods of Pearson* (1) the Court intimated that if the property had been very small the consents of the next of kin might have been dispensed with in order to save expense.

GORELL BARNES J. I think this is a case in which I may accede to your application. I have had to consider these cases of lost wills a good deal lately, and at the present time I am prepared to modify the view I expressed in the case of *In the Goods of Pearson*. (1) I think now that in clear cases, without specifying what those cases may be, these applications may be acceded to. I grant to the applicant administration with the will, as contained in the copy, annexed, until the original will shall be found.

Solicitor: *R. S. Tredgold.*

(1) [1896] P. 289.

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## DICKS *v.* DICKS.

1899
*June* 26;
*July* 3, 14.

*Divorce—Practice—Restitution of Conjugal Rights — Decree—Service out of Jurisdiction.*

The fact that a decree for restitution of conjugal rights has been served upon a respondent when temporarily resident out of the jurisdiction does not vitiate its effect, if it also appear that the respondent was, for all practical purposes, as capable of complying with the decree, within the time limited therein, as if he had been served in this country.

WIFE'S petition for dissolution, upon the ground of adultery coupled with statutory desertion, by reason of non-compliance with a decree for restitution of conjugal rights.

From the evidence it appeared that the respondent was domiciled in England. His father was a publisher in business in this country. The respondent himself had no occupation, and had resided here with his wife, except when he paid casual visits to Ireland.

On November 15, 1898, the respondent was served in London with a citation and petition for restitution of conjugal rights; and, on March 6, 1899, a decree was made ordering him to receive back his wife within fourteen days from the date of service upon him of the decree.

The service was effected upon him in Dublin.

Having failed to comply with the decree, the wife commenced a suit for divorce, the citation and petition in which were duly served upon him at Chester, where a copy of the order for restitution was at the same time handed to him.

No appearance was entered, and the suit came on as an undefended cause.

*R. H. Pritchard*, for the petitioner, called the attention of the Court to the facts relating to the service of the decree in the restitution suit, and referred to *Pearson* v. *Pearson* (1),

(1) (1864) 33 L. J. (P. & M.) 157.

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*Yelverton* v. *Yelverton* (1), *Firebrace* v. *Firebrace* (2), *Chichester* v. *Chichester* (3), *Le Mesurier* v. *Le Mesurier* (4), and the Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), ss. 5, 6.

*Cur. adv. vult*

July 14. GORELL BARNES J. This was a suit by the petitioner for the dissolution of her marriage with the respondent on the ground of his adultery with a person named Norman, and on the ground of desertion on the part of the respondent in neglecting to comply with an order in a former suit by the petitioner for restitution of conjugal rights. The adultery was proved, and the proceedings in the suit for restitution of conjugal rights and the service of the order made in that suit were proved before me. But Mr. Pritchard, who represented the petitioner, very properly called my attention to the fact that the order in the suit for restitution of conjugal rights, which was made on March 6, 1899, requiring the respondent to return to his wife and render her conjugal rights within fourteen days from the service of the order, was served upon the respondent at the Gresham Hotel in Dublin. Counsel also referred me to certain cases which might give rise to the question whether this service of the order out of the jurisdiction was good service. The dates with regard to the restitution suit were as follow: The suit was commenced on November 12, 1898, and the respondent was served with the citation and petition on November 15, 1898, at 16, Bedford Row, London. The decree was made, as I have said, on March 6, 1899. The citation and petition in the present suit were filed on April 21, 1899—that is to say, more than fourteen days after the order in the restitution suit had been served; and this citation and petition for divorce were served upon the respondent at the Queen's Hotel, Chester, on April 29, 1899; and, if I recollect rightly, a further copy of the order for restitution of conjugal rights was served at the same time. The statement of these dates and facts shews that there might be a point raised as to whether,

(1) (1859) 1 Sw. & Tr. 574.
(2) (1878) 4 P. D. 63.
(3) (1885) 10 P. D. 186.
(4) [1895] A. C. 517.

in the circumstances of the case, the service of the order for restitution of conjugal rights was properly effected upon the respondent in Dublin. I have referred to the cases which Mr. Pritchard cited to me, and, I think, with one exception, they deal with the question whether a person not domiciled within the jurisdiction of this Court had been rightly served out of the jurisdiction in a suit for restitution of conjugal rights; and they do not appear to me to have any bearing on the present case, because there is no doubt that the respondent in this instance was domiciled in this country, and, as far as I can understand, he seems to have been temporarily resident in Ireland at the time when he was served with the order; and he was served in this country with the original proceedings in both suits. The case which I referred to as an exception is *Pearson* v. *Pearson* (1), where it was directed that the decree for restitution of conjugal rights should be served upon the respondent, who was then in Shanghai, on his return to England; but I do not think that case really affects the present question at all. The Matrimonial Causes Act, 1884 (47 & 48 Vict. c. 68), entirely altered the law with respect to restitution of conjugal rights.

It is not necessary that I should consider what would be the position of the parties if this suit had arisen prior to the date when that Act came into operation; nor do I think it necessary, in the circumstances, to consider what would be the effect of serving such an order as was obtained by the petitioner in this case upon a respondent when he was not in a position to be able to comply with the order within the time limited by such order; because it is quite obvious that the order in the present case could have been obeyed practically with as much ease from Dublin as if the respondent had been served at Chester. From my examination of the cases, and considering the matter as it stands now, since the Act of 1884 was passed, and having regard to the fact that this gentleman was domiciled in this country, I do not see that the service upon him in Ireland of the order in the restitution suit affects the petitioner's rights in this case. Having considered the matter,

(1) 33 L. J. (P. & M.) 157.

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as I have had to do, of course, without argument on the other side, because both these suits were undefended, I am of opinion that the petitioner is entitled to the relief which she seeks, and I pronounce a decree nisi for the dissolution of the marriage, with costs against the respondent, and I order that the petitioner have the custody of the children.

Solicitors: *Winter, Bothamley & Co.*

H. D. G.

SICKERT *v.* SICKERT. ([1899] P. 278; 81 L.T. 495). *Dictum of* GORELL BARNES, J. ([1899] P. 283; 81 L.T. 496) *approved.* EDWARDS *v.* EDWARDS .. .. [1948] 1 All E.R. 157

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*July* 18, 26.

## SICKERT *v.* SICKERT.

*Desertion—Husband's Adultery—Refusal to lead Chaste Life—Wife unable to continue Cohabitation.*

In order to constitute desertion, there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other.

It is not always, or necessarily, the guilty party who leaves the matrimonial home: the party who intends to bring the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion.

There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife, and that of a husband who, with the like intent, obliges his wife to separate from him.

In a case where a husband is carrying on an adulterous intercourse with another woman or other women, although he does not bring the adulteress into the matrimonial home and commit adultery with her there, the wife may express her willingness to remain with him on condition that he give up the connection complained of; and, if the husband refuse to do so, and the wife withdraw from cohabitation in consequence of the refusal, the husband is guilty of desertion, as he must be taken to intend the consequences of his action. The situation then produced is just the same as if the guilty husband left his wife. At the end of two years the statutory offence of desertion is complete, and the wife is entitled to relief on that ground.

WIFE'S petition for dissolution on the grounds of desertion and adultery.

Ellen Millicent Ashburner Sickert, the petitioner, was married to Walter Richard Sickert, the respondent, on June 10, 1885, at the office of the registrar for the district of Marylebone, in

the county of Middlesex, and they afterwards cohabited at divers places. There was no issue of the marriage.

The petition alleged that on or about September 29, 1896, the respondent without reasonable excuse deserted the petitioner, and never since that time returned to cohabitation with her. The respondent was also alleged to have committed adultery on April 21, 1898, with a woman whose name was unknown to the petitioner, at the Midland Grand Hotel, London; and, on May 4 and 6, 1899, with a woman whose name was unknown to the petitioner, at the London and Paris Hotel, Newhaven, in the county of Sussex.

In the course of her examination in court the following answers were given by the petitioner to some of the questions put to her by her counsel and by the learned judge: "(*Q.*) Would you have returned to him if he had undertaken to give up this life? (*A.*) I should have considered it. (*Q.*) Were you ever brought into contact with any of these women? (*A.*) Yes; they visited at my house. (*Q.*) What has taken place in the house? (*A.*) Only they were friends visiting. (*Q.*) Did any adultery take place under your own roof? (*A.*) Not that I knew of. We stayed at different places for a few months or weeks at a time. We had no home in England during the past four or five years. Our home was a constantly moving one. (*Q.*) Did the improper intercourse take place where you actually were yourself, or was it only where they were? (*A.*) I suppose it was where they were."

*Bargrave Deane*, Q.C. (*Llewelyn Davies* with him), for the petitioner. In some cases where husband and wife have been living apart by mutual consent desertion has been held to commence from the time when adultery began. *Pizzala* v. *Pizzala* (1) and *Koch* v. *Koch* (2) are authorities in favour of the petitioner. The earlier decision in *Graves* v. *Graves* (3) is also an authority, where the reason for the wife leaving her home was because the husband had insulted her in the presence of friends; and then, while she was packing up, he himself

(1) *The Times*, June 5, 1896, cited from 12 T. L. R. 451, on p. 283.

(2) Ante, p. 221.

(3) (1864) 33 L. J. (P. & M.) 66.

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went away, having previously told her that after the following September he would have no house for her.

[GORELL BARNES J. That decision is no authority here, because the husband in that case forced his wife to leave.]

If a man so conducts himself that no decent, respectable woman can live with him, he by moral, if not by physical, force drives his wife from the house, and, upon the authority of the cases cited, he must be held guilty of desertion.

[GORELL BARNES J. Is there any authority for holding that there is desertion in such a case as this? The respondent did not bring any of these women into the house where his wife was, and insist on keeping them there. Your contention practically amounts to this—that a woman is to obtain a decree of dissolution on the ground of adultery alone, although the statute says that to obtain the full measure of relief she must prove some matrimonial offence against her husband in addition to adultery.]

The respondent was offered forgiveness if he would lead a different sort of life, but he said he could not—it was not in him. Desertion is a question of intention, and the conduct of the respondent shews his intention to keep his wife away from him. It is not a mere case of a wife knowing of adultery on the part of her husband, but he had warning of the result of a continuance of his acts.

*Cur. adv. vult.*

July 26. GORELL BARNES J. delivered the following written judgment:—The petition in this case prays for a dissolution of the petitioner's marriage with the respondent on the grounds of his alleged desertion and adultery. The adultery in April, 1898, and May, 1899, was proved; but an important question is raised with regard to the alleged desertion.

The facts appear to be that the petitioner was married to the respondent, who is an artist, on June 10, 1885, and that they lived together until September 29, 1896. The effect of the evidence is that, in 1895, the petitioner had strong suspicion that the respondent was leading an improper life; that in 1895 she found a letter to him from a woman, and that he admitted

to two cases of adultery, one with her and one with another woman; but that, as he promised to have nothing more to do with them, she forgave him; that in May, 1896, there was a short separation between them in consequence of his conduct, but that he rejoined her in Switzerland; that on September 29, 1896, while they were at Fluelen, on the Lake of Lucerne, he made a statement to her the substance of which was that it was no use concealing the fact that he had never been faithful to her and never could be, and that the petitioner said that as long as the respondent lived that sort of life she could not live with him, but was willing to do so if he would give it up, but he declined to do so. They thereupon separated, and have ever since lived apart.

On December 8, 1898, the petitioner wrote to the respondent as follows:—

"Dear Walter,—In spite of your having told me, when we parted in Switzerland in September, 1896, that immediately after our marriage and ever since you had lived an adulterous life and that you felt sure you could never live a different one, I have been hoping against hope that you would abandon it; but all that I have heard of you during the last two years has forced me to give up all possible hope for the future.

"Yours truly,

"E. M. Sickert."

To which the respondent replied as follows:—

"My dear Nellie,—I have received your letter of December 8. It is quite true that I have not been faithful to you since our marriage, and it is equally true that during the two years since we parted I have been intimate with several women. As I told you long ago, I cannot continue a life of dissimulation. I have chosen my mode of life, and I am unable to alter it. An undertaking on my part would be misleading.

"Ever your profoundly attached

"Walter Sickert."

Shortly afterwards, in May, 1899, this suit was commenced. There have been a number of cases on this question of desertion, but as they were mostly undefended and the question raised

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upon such facts as those of this case is of considerable importance, I reserved my judgment.

A wife is entitled to obtain a divorce from her husband if he has been guilty of (inter alia) adultery coupled with desertion without reasonable excuse for two years or upwards.

In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him.

This view of the law applicable to desertion has been taken in the cases of *Dickinson* v. *Dickinson* (1) and *Koch* v. *Koch*. (2) In the first of these cases the husband brought to the house a woman with whom he had immoral relations. The wife refused to admit her, but the husband insisted. The wife remained a short time, and then told her husband that either she or the woman must leave the house. The husband told her she might do as she liked, but that the woman would remain. The wife thereupon left, and never afterwards cohabited with her husband. Sir Charles Butt held that the husband was guilty of deserting his wife. In the second case, which was heard before myself, the husband was guilty of immoral relations with a servant in the house. The husband refused to break off these relations and to discharge the girl, and the wife thereupon left the house; the husband continued to live for years with the servant. I held the husband guilty of desertion.

In these two cases the adulterous intercourse which the husband refused to put an end to was being carried on in the matrimonial home; but in the earlier case of *Graves* v. *Graves* (3),

(1) 62 L. T. 330.
(2) Ante, p. 221.
(3) 3 Sw. & Tr. 350; 33 L. J. (P. & M.) 66.

heard by Lord Penzance in 1864, the adulterous intercourse, though carried on for a time in the home occupied by the petitioner and respondent, was not discovered by the petitioner until after the parties had separated. The report in the *Law Journal* is the fuller of the two, and the head-note is as follows:—

"Shortly after a marriage, the husband, with the intention of bringing about a separation, so treated his wife as to compel her to leave him. She subsequently made several offers to return, but he refused to receive her. She continued willing to return until she found that he was carrying on an adulterous intercourse, which had subsisted since the marriage. She then refused to return, except upon condition that such intercourse should cease:—

"*Held*, that the husband's conduct, before the wife became aware of his adultery, amounted to desertion, and that such desertion was not put an end to by her unwillingness to return while the adultery continued."

The present case is scarcely distinguishable from the case of *Pizzala* v. *Pizzala*. (1) There the husband was carrying on an adulterous intercourse with another woman, but not in the matrimonial home, and refused to break it off although his wife told him that unless he did so she must leave him. The wife then left him, and he continued to live with the woman for over two years. The President held the husband guilty of desertion.

These cases all appear to me to have been decided in accordance with the principles shortly stated above, and no distinction has been made whether the adulterous intercourse was carried on in the matrimonial home or elsewhere. A wife whose husband is carrying on adulterous intercourse with another woman or other women is not bound to remain in cohabitation with him: she can at once obtain a judicial separation. She may, however, be willing to remain with her husband provided he will give up the connection complained of, and, if he refuse to do so, a wife with any self-respect has only one course to take—that is, to withdraw from cohabitation.

(1) 12 T. L. R. 451.

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Gorell Barnes J.

The husband in such a case must be taken to intend the consequences of his action—that is to say, that his wife shall not live with him. The situation then produced is just the same as if the guilty husband left his wife. Desertion is not to be tested by merely ascertaining which party left the matrimonial home first. It may be committed by a husband acting as I have just said, and if the attitude of the parties remain the same for two years the offence of desertion contemplated by the statute is complete.

I may add that the American writer, Bishop, in his work on the law of marriage and divorce, has the following passage on the subject of desertion (Bishop's Law of Marriage and Divorce, ed. (1891) vol. i. sect. 1710): "It is immaterial which of the married parties leaves the matrimonial home; the one who intends bringing the cohabitation to an end commits the desertion."

I am of opinion that, upon the facts proved in evidence before me in the present case, the respondent has been guilty of adultery coupled with desertion for two years and upwards, and I pronounce a decree nisi with costs.

Solicitors: *Sharpe, Parker, Pritchards & Barham, for Mathews, James & Co., Birmingham.*

H. D. G.

[IN THE COURT OF APPEAL.]

C. A.
1899
*July* 24, 26;
*Aug.* 5.

## THE GEMMA.

*Admiralty—Collision—Action in Rem—Arrest—Bail—Release—Judgment—Unpaid Balance of Damages—Practice—*24 *Vict. c.* 10, *s.* 15—*Writ of Fieri Facias.*

A collision occurred in the river Thames between a British and a foreign vessel. The owners of the British vessel commenced an action in rem and arrested the foreign vessel, the owners of which, domiciled abroad, appeared, and, having put in bail for the full value of the vessel and her freight, she was released. The foreign vessel was subsequently found alone to blame, and the decree in the usual form, in the case of owners who have appeared, condemned the defendants and their bail in damages and costs. The damages proved to be in excess of the amount of the bail, and the plaintiffs, in respect of this balance, sued out a writ of fieri facias under which the foreign vessel was seized. On application to the Court the sheriff was ordered to withdraw:—

*Held*, by the Court of Appeal (A. L. Smith and Vaughan Williams L.JJ.), reversing the decision of Bucknill J., that the owners of the foreign vessel had, by appearing, rendered themselves personally liable, and, therefore, payment of the balance could be enforced under s. 15 of 24 Vict. c. 10, by a writ of fieri facias against any of their goods and chattels, including the released vessel, within the jurisdiction.

*The Dictator*, [1892] P. 304, held applicable, approved, and followed.

APPEAL from an order of Bucknill J. directing the sheriff of the county of the borough and town of Berwick-on-Tweed to withdraw from possession of the steamship *Gemma*.

The question was whether, after judgment in an action in rem of damage by collision, a vessel—the owners of which were foreigners domiciled abroad, who had appeared as defendants—could be seized, as being of the goods and chattels of the defendants, under a writ of fieri facias issued by the plaintiffs in respect of an unsatisfied balance of damages, though bail to her full value and that of her freight had been given, and the vessel released from arrest.

The material facts were shortly as follows:—

On February 21, 1898, a collision occurred, in Sea Reach of the river Thames, between the British steamship *Kildona*

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and the foreign steamship *Gemma*. The owners of the *Kildona*, as plaintiffs, commenced an action in rem, and caused the *Gemma* to be arrested; but on February 24, London solicitors instructed by her managing owners, Holm & Molzen of Flensburg, Germany, entered an appearance and undertook to put in bail, and the vessel was thereupon released. On March 17 two surveyors, one appointed by the plaintiffs and the other by the defendants, valued the vessel at 4500*l.*, and, the value of the freight having been agreed at 375*l.*, bail was completed in the sum of 4875*l.*, the bail bond being conditioned in the usual form that, "if the said defendants (the owners of the *Gemma*) shall not pay what may be adjudged against them in the said action with costs, execution may issue forth against us" (the bail) for a sum not exceeding 4875*l.* On April 6 the plaintiffs delivered their statement of claim, claiming judgment in the usual form "against the defendants and their bail for the amount of damages occasioned by the collision and costs," and, on April 20, the defendants put in a defence, and by their counter-claim claimed judgment, in similar terms, against the plaintiffs and their bail.

At the hearing on July 6 the Court pronounced the *Gemma* alone to blame, dismissed the defendants' counter-claim, and, in the usual form, "condemned the defendants and their bail in damages and costs." At the reference the registrar, assisted by merchants, assessed the plaintiffs' damages at 5538*l.* 5*s.* 10*d.*, with interest to date of payment, and the costs were subsequently taxed at 441*l.* 10*s.* 5*d.*, making together 5979*l.* 16*s.* 3*d.*

On May 11, 1899, the defendants paid the plaintiffs 4875*l.*, being the full value of their ship and of her freight, and the amount for which bail had been given.

In respect of the unsatisfied balance, the plaintiffs on July 11 sued out a writ of fieri facias directing the sheriff to cause to be made "of the goods and chattels of Holm & Molzen of Flensburg, Germany, in your bailiwick," the sum of 1317*l.* 8*s.* 10*d.*, together with sundry costs and interest. Under this writ the *Gemma* was seized at Berwick.

July 13. The owners of the *Gemma* applied for an order directing the sheriff to withdraw, and Bucknill J., sitting in

Admiralty, made the order on the ground that, according to *The Christiansborg* (1), bail was equivalent to the res, so that, bail having been completed in the full value of ship and freight, the *Gemma* was released from "all rights and claims against her in respect of the collision."

July 24, 26. The plaintiffs appealed.

*Robson, Q.C.*, and *Aspinall, Q.C.*, for the appellants. By accepting bail in the value of the ship the plaintiffs released their maritime lien, but they did not thereby surrender their rights against the owners of the vessel personally, for, by appearing, the owners submitted to the jurisdiction and, as against them, the proceedings are in personam: see *The Dictator*. (2) In that case it was pointed out by counsel for the plaintiffs (3), and assented to by the Court, that, in an Admiralty action, it is not now necessary to serve a monition to pay, before suing out a writ of fieri facias, as, under the Admiralty Court Act, 1861 (4), decrees and orders of the Court of Admiralty are to have the effect of judgments at common law. It was also pointed out by Jeune J., in his judgment in that case (5), that the form of the bail bond shews "that the bail is liable in a specified amount for the payment by the defendants of the whole amount of the judgment," and that though, in a sense,

(1) (1885) 10 P. D. 141, per Fry L.J. at p. 156.

(2) [1892] P. 304.

(3) [1892] P. 306.

(4) 24 Vict. c. 10, s. 15: "All decrees and orders of the High Court of Admiralty, whereby any sum of money, or any costs, charges, or expenses, shall be payable to any person, shall have the same effect as judgments in the Superior Courts of Common Law, and the persons to whom any such moneys, or costs, charges, or expenses, shall be payable, shall be deemed judgment creditors, and all powers of enforcing judgments possessed by the Superior Courts of Common Law, or any judge thereof, with respect to matters depending in the same Courts, as well against the ships and goods arrested as against the person of the judgment debtor, shall be possessed by the said Court of Admiralty with respect to matters therein depending; and all remedies at common law possessed by judgment creditors shall be in like manner possessed by persons to whom any moneys, costs, charges, or expenses are by such orders or decrees of the said Court of Admiralty directed to be paid."

(5) [1892] P. 322.

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bail stands in the place of the res, "it is quite another thing to say that the liability of the owner is confined to the same amount as the liability of the bail, and that the ship or any other goods of the defendants cannot be taken in execution."

It is submitted that the plaintiffs are, under the statute, in the position of judgment creditors, and that, in respect of the unsatisfied balance of the judgment debt, the whole property of the judgment debtors is liable, and, therefore, the plaintiffs are entitled to issue execution against such goods and chattels of the defendants, including the *Gemma*, as may be found within the jurisdiction.

*Joseph Walton, Q.C., Carver, Q.C.*, and *Lauriston Batten*, for the respondents, the owners of the *Gemma*. The writ of summons in an Admiralty action in rem is addressed to "the owners and parties interested" in the res. A copy of it is nailed to the mast, and the owners are not brought before the Court by any personal notice. Any person having an interest in or claim to the property proceeded against, such as a mortgagee, may intervene and contest the claim of the plaintiff, but no personal liability is thereby incurred, as the remedy in actions in rem is limited by the value of the res, and the whole procedure is for the purpose of enforcing the maritime lien on the res. If the owners, or parties interested, do not appear, the res is arrested by the marshal, and sold by order of the Court, but there is no judgment against the owner of the res. In this case the vessel was arrested, but, on bail for her full value and of that of her freight being given, the bail took the place of the res. The full amount for which bail was given—that is, the full value of ship and freight—was subsequently paid and the bail bond cancelled, so that the vessel is not only now free from arrest, but is discharged from any further claim against her in this action, the judgment in which, to the extent of her value, has been satisfied.

Sect. 15 of the Admiralty Court Act, 1861, was enacted for the purpose of getting rid of the necessity of serving a monition to pay, and under it decrees and orders of the Admiralty Court can be enforced by common law process where the nature of the case renders such process available; but the statute was

only intended to simplify the procedure, not to alter rights. It did not enlarge the jurisdiction of the Court so as to extend the effect of a proceeding in rem, and introduce personal liability where none existed, or enable the same ship to be seized for which bail to her full value had been given.

The effect of investing the Court with authority such as the courts of common law possessed was considered in *The Wild Ranger* (1), where this section of the Act of 1861 was relied on; but Dr. Lushington said: "Bail given for a ship in any action is a substitute for the ship; and whenever bail is given, the ship is wholly released from the cause of action, and cannot be arrested again for that cause of action." Fry L.J. in *The Christiansborg* (2) takes the same view, and says, "The result of the giving of bail is the release of the ship"; and he regarded the re-arrest as against good faith. In the same case Lord Hannen pointed out (3) that the object of obtaining the release of the vessel is that she may "continue on her voyage and be useful in any part of the world to her owners."

The case of *The Dictator* (4) is not in point, for there the amount of the salvage award was 7500*l.*, whilst the value of the salved ship, her cargo, and freight was 179,200*l.*, so that there was a very large margin, and the question raised in the present case did not arise.

[The cases of *The Parlement Belge* (5) and *The Freedom* (6) were referred to.]

*Robson, Q.C.*, in reply. It may be that if the defendants, relying upon their position as foreigners domiciled abroad, had not entered an appearance, the proceedings would have been throughout in rem—that is to say, as the owners did not appear the effect of the judgment would have been limited to the res, but if the owners do appear to contest or reduce their liability they are before the Court not only for the purpose of protecting their interest in the res, but also for the purpose of protecting their own personal liability, and this is indicated by the difference in the form of the decrees in the two cases.

(1) (1863) Br. & L. 84, at p. 87.
(2) 10 P. D. 141, at p. 156.
(3) 10 P. D. 144.
(4) [1892] P. 304.
(5) (1880) 5 P. D. 197.
(6) (1871) L. R. 3 A. & E. 495.

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The case of *The Christiansborg* (1) is not in point, for there the question was whether, where bail had been given in an action in Holland, an action should be allowed to proceed at the same time in England against the ship. The majority of the Court of Appeal held that the second action in England ought to be stayed, as there was a lis alibi pendens in which security had been given, and if that security was not equivalent to bail, but was a private agreement, then the arrest of the ship in England was against good faith. The expression used in that case, "bail is equivalent to the res," must be read with reference to the facts of that case, and only relates to the question of re-arresting in respect of the collision before judgment; but in the present case the plaintiffs did not cause the sheriff to seize the *Gemma* to answer "a claim in respect of the collision," but they are seeking, after judgment, as judgment creditors, to enforce payment of the balance of moneys directed by an Admiralty decree to be paid.

The case of *The Wild Ranger* (2) is referred to in *The Dictator* (3), and, if inconsistent with the principles laid down in the latter case, it must be deemed overruled.

*Cur. adv. vult.*

Aug. 5. A. L. SMITH L.J. [The learned judge read s. 15 of the Admiralty Court Act, 1861, already set out, and continued:—] The question is, Can plaintiffs, who have an unsatisfied decree of the Admiralty Court in their favour, by means of a writ of fieri facias, directed to the sheriff of the county to take the goods of the defendants within his bailiwick, have execution levied under such a writ upon a ship of the defendants, which happens to come and be within the jurisdiction of the sheriff, after the ship had been arrested and released on bail, before judgment, in an action commenced in the Admiralty Court in rem?

It will be noticed that s. 15 of the Act is in terms general. It enacts that "judgment creditors" under decrees shall have

(1) 10 P. D. 141. (2) Br. & L. 84.
(3) [1892] P. 304, at p. 321.

all powers of enforcing decrees of the Court of Admiralty as are possessed by judgment creditors in the Superior Courts of Common Law, and there is no fetter imposed by the section as to not taking a ship in execution, if the ship seized by a sheriff had theretofore been held to bail and then released in an action in rem.

[The learned judge then dealt with the facts of the case, the appearance by the defendants, the putting in of bail, the form of the bail bond, the nature of the statement of claim of the plaintiffs, and the defence and counter-claim of the defendants, already set out, and proceeded:—]

That the defendants thus submitted to the jurisdiction of the Court I cannot doubt, and the issues so raised upon the pleadings by the respective parties were then fought out, with the result that a decree was made pronouncing that the *Gemma* was solely to blame for the collision, and further pronouncing "against the defendants' counter-claim"; and the learned judge "condemned the defendants and their bail in damages and costs, and referred such damages to the registrar and merchants to report the amount thereof."

This reference has taken place; the amount of the plaintiffs' damages has been assessed, and the costs have been taxed, with the result that, after allowing for the 4875*l.* for which bail was given, there is still an unsatisfied sum under the decree payable to the plaintiffs by the defendants.

I would point out that, if the defendants had not appeared, and the proceedings had throughout been solely in rem, the judgment or decree, according to the practice of the Admiralty Court, would have been not, as in the present case, condemning the "defendants in damages and costs," but would have condemned the ship alone.

Now, apart from authority, it appears to me that when persons, whose ship has been arrested by the marshal of the Admiralty Court, think fit to appear and fight out their liability before the Court, the form of the proceedings in the Admiralty Court shew—and it is not disputed that the forms I have referred to are those which have been in use, according to the practice of the Court, from olden times—that the persons

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so appearing, as the defendants have done in the present case, become parties to the action, and thereby become personally liable to pay whatever in the result may be decreed against them; and the action, though originally commenced in rem, becomes a personal action against the defendants upon appearance. For what purpose does a party appear to an action in rem? There are, as it seems to me, three reasons for the appearance: first, to release the ship, so that it may go on trading for the owner; secondly, to contest the plaintiffs' allegations that the ship had been in default; and, thirdly, in order to prevent its being sold.

The President, in a judgment full of learning and research, in which he dealt with all the cases from the earliest time, whether in conflict or not with each other, has held in the case of *The Dictator* (1) that a person appearing in an action in rem becomes personally liable, and considering that no real argument was addressed to us to impeach this judgment, and having considered it, and the principles appertaining to the present case, I do not doubt that the President came to the correct conclusion, and I adopt it.

I will here use the words of Mr. Barnes—now Barnes J.—which I find in his argument in the case of *The Dictator* (2), for, in my opinion, they express in short and clear language what I wish to express. He says: "The plaintiffs have, therefore, a judgment in their favour for this amount, and as the defendants appeared and gave an undertaking equivalent to bail"—in the present case they have done far more—" they have submitted themselves to the jurisdiction of the Court, and have thereby rendered themselves personally liable . . . . the result is that the plaintiffs are in a position to issue execution against the property of the defendants to the extent of the property proceeded against, and under the present practice it is not necessary that a monition to pay should be served upon the defendants before suing out writs of fieri facias."

I asked, during the argument, upon what principle it was that the defendants contended that no fieri facias could be sued out by a judgment creditor against the goods of a judgment

(1) [1892] P. 304. (2) [1892] P. at p. 306.

debtor under the Act of 1861. I was told that it was upon the ground that it was against good faith to do so, if bail had been given for a ship proceeded against in rem. But where is there any bad faith in a judgment creditor attempting to realize the fruits of his judgment from a person who has been condemned to pay the same to him? This I cannot see.

The case of *The Christiansborg* (1) was cited in support of the proposition that it was against good faith; but that case appears to me to be altogether different. In it the plaintiffs had brought an action in rem in Holland, and arrested the defendants' ship, and the plaintiffs then allowed the ship to be released on the underwriters of the ship guaranteeing to the persons interested a sum by way of compensation, which the ship might eventually have to pay by legal decision in Holland. The ship was then released, and, whilst the suit was proceeding in Holland, the plaintiffs took second proceedings in rem against the ship here. The majority of the Court (Baggallay and Fry L.JJ., Lord Esher dissenting) held that, bail having been given in Holland in an action in rem, a second action in rem should not be allowed to go on here at the same time, or if the guarantee given in Holland was not the equivalent to bail, but a private arrangement, then the arrest of the ship in England was against good faith as regards the arrangement.

How does that case apply to the present, where no one is litigating in rem in two courts at the same time, and where no one is proceeding to take the ship in breach of any agreement that when a decree had been made they would not realize what they were entitled to under it? Where is to be found in this case any agreement that if the bail put in to release the ship did not satisfy the damages and costs afterwards to be awarded to the plaintiffs, and after the defendants had unsuccessfully litigated with the plaintiffs and put them to the costs of so doing, that the defendants should be relieved from payment of that in which they had been condemned? I can find no such agreement.

This is simply the case of a judgment creditor endeavouring

(1) 10 P. D. 141.

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to obtain satisfaction for his judgment by taking, by means of a writ of fieri facias, the goods of his judgment debtor which in the year 1899 happen to be within the bailiwick of the sheriff to whom the writ has been directed. There is no bad faith at all—at any rate, upon the plaintiffs' part. I need say nothing about the other ship of the defendants, the *Wega*, for it escaped before the fieri facias as to it could be executed, and it was not disputed at the bar that had this writ been executed all would have been in order. For these reasons I hold that the sheriff should not have been ordered to withdraw.

VAUGHAN WILLIAMS L.J. concurred.

*Appeal allowed with costs here and below.*

Solicitors for appellants (plaintiffs): *Thomas Cooper & Co.*
Solicitors for respondents (defendants): *Stokes & Stokes.*

T. L. M.

## THE HAABET.

1899
*June* 27;
*July* 3;
*Aug.* 12.

*Admiralty—Bottomry—Maritime Risk—Maritime Interest—Personal Credit —Right to Payment at Intermediate Port—Insurance.*

The master of a Norwegian barque at Barbados, being in need of necessaries, obtained a cash advance on the security of an instrument by which he promised to repay the amount "within ten days after arrival at port of discharge in Europe, or at any other place at which the voyage may terminate . . . . in an approved banker's sight draft or cheque on London to the order of (the agents of the lender) . . . . and for which I hereby pledge the said vessel, her freight and her owners. This claim to have priority over all others that may be presented against the said freight and vessel, with the express agreement, however, that it shall not invalidate or affect the lien upon, or right of process against, the said vessel and freight and owners for the amount of this bill . . . . in case of its not being duly accepted and paid. Provided always . . . . that if the said vessel shall, in the course of the voyage on which she is now being despatched, go into any port of refuge to repair there, all the moneys for the payment of which the said vessel, her freight, and owners, are hereby pledged, shall forthwith become due and payable, and it shall be lawful for the said (agents) to proceed at once against the said vessel, freight and owners, or any or either of the same, separately, to recover the amount of this bill. . . ." In the margin was a note as to insurance by the lender:—

*Held*, by Bucknill J., that the instrument was a valid bottomry bond, for the lender of the money ran the risk of the vessel not reaching her port of discharge, and, therefore, it was immaterial that there was no stipulation as to maritime interest, nor was the bond invalidated by the bill transaction contained in it, or by the loan becoming immediately payable on the vessel putting into a port of refuge, or by the memorandum as to insurance.

SUMMONS (adjourned into court), in an action in rem for necessaries, for an order directing the payment to the plaintiffs out of the fund in court, representing the proceeds of the Norwegian barque *Haabet*, of the sum of 171*l.* 4*s.* 5*d.*, together with taxed costs.

On August 12, 1898, the plaintiffs, J. Fabert & Co. of Liverpool, arrested the *Haabet* at Dover, and on September 14 obtained an order, under which, with the consent of the parties interested, the vessel was appraised and sold by the Court. The net proceeds amounted to 283*l.* 19*s.* 8*d.*, a sum insufficient

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to satisfy the various claims upon the vessel, and the present summons was opposed by Hänschell & Co., plaintiffs in another action against the ship and her freight, who claimed priority as the holders of a bottomry bond granted to secure a loan for necessaries amounting to 144*l.* 17*s.* 7*d.*

The case is reported on the question of the validity of this bond, which was signed by the master at Barbados, and dated April 7, 1898. It was in the following terms:—

"Within ten days after arrival at port of discharge in Europe, or at any other place at which the voyage may terminate, of the Norwegian barque *Haabet*, under my command, now being despatched for a voyage from Apalachicola, I promise to pay in an approved banker's sight draft or cheque on London in sterling to the order of Messrs. Brodr. Trier, Copenhagen, or if on arrival so instructed by them to remit to them direct, or, at their option, my consignees are hereby instructed to deduct from the freight due to the vessel and hold at the disposal of Messrs. Brodr. Trier, for credit of Messrs. Hänschell & Co., Barbados, the sum of 144*l.* 17*s.* 7*d.* One hundred and forty-four pounds 17*s.* 7*d.* sterling, being amount of cash advances made to me here by the said Hänschell & Co. to defray vessel's necessary expenses and disbursements at this port, and for which I hereby pledge the said vessel, her freight, and her owners; all cost of remittance to be for vessel's account.

"This claim to have priority over all others that may be presented against the said freight and vessel, with the express agreement, however, that it shall not invalidate or affect the lien upon or right of process against the said vessel and freight and owners for the amount of this bill, with costs and expenses of recovering and interest, in case of its not being duly accepted and paid. Provided always, and it is hereby expressly agreed and declared, that if the said vessel shall, in the course of the voyage on which she is now being despatched, go into any port of refuge to repair there, all the moneys, for the payment of which the said vessel, her freight and owners are hereby pledged, shall forthwith become due and payable, and it shall be lawful for the said Messrs. Brodr. Trier, or their agents or representatives, to proceed at once

against the said vessel, freight and owners, or any or either of the same, separately, to recover the amount of this bill, and all costs and expenses incurred in recovering the same.

"Signed in duplicate, one being accomplished, the other to stand void."

In the margin was written: "Insured under open policy with Fjerde Soprsikringsselskab through Messrs. Brodr. Trier, Copenhagen."

June 27; July 3. *Adair Roche*, for the plaintiffs, J. Fabert & Co. The alleged bond does not give priority to Hänschell & Co., as it only amounts to a bill transaction, and is wanting in the essentials to a valid instrument of hypothecation. Maritime risk, directly or indirectly expressed, is necessary: *The Emancipation* (1); *The Indomitable* (2); but the instrument or bill is to be payable by the owners in any event, and to become immediately payable if the vessel puts into a port of refuge. The absence of any stipulation as to maritime premium indicates the true nature of the document—that is, that it is founded on personal credit independently of the vessel: *The Royal Arch.* (3) This is not a case of bills given as collateral security, but, by the document itself, the personal credit of the owners is pledged, and the right against the owners being separately reserved destroys the character of the instrument as a bond which can be enforced by this Court, and prevents the lender having any insurable interest: *Stainbank* v. *Fenning* (4); *Stainbank* v. *Shepard.* (5)

*Lewis Noad*, for the plaintiffs, Hänschell & Co. The bond is valid, for the words "after arrival at port of discharge" are a sufficient description of sea risk; and, even if the owners are personally bound, that may vitiate a portion, but not the whole bond: *The Nelson.* (6) As there is an expression of maritime risk, the absence of any provision for bottomry premium is not material: *The Laurel.* (7) The condition that the money is to

(1) (1840) 1 Wm. Rob. 124, at p. 130.
(2) (1859) Sw. 446.
(3) (1857) Sw. 269, at p. 278.
(4) (1851) 11 C. B. 51.
(5) (1853) 13 C. B. 418.
(6) (1823) 1 Hagg. 169, at p. 176.
(7) (1864) Br. & L. 317, at p. 320.

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become payable on the vessel going into a port of refuge does not invalidate the instrument: see the form of the bond in *The Cecilie* (1); the meaning is, that payment is to be made by draft within ten days after arrival at a port of discharge, or in the event of the vessel putting into a port of refuge.

Taking the double security of bills of exchange and a bottomry bond for money advanced for the necessities of the ship is common practice, and the words "this bill" refer to the banker's draft; but, if they do not, a wrong description will not prevent the document holding good as a bond: see *The Elpis*. (2)

*Roche*, in reply.

*Cur. adv. vult.*

Aug. 12. BUCKNILL J. The question I have to decide is whether this document is a bottomry bond. [The learned judge read the material portions of the instrument already set out, and continued:—]

From the document itself it is clear that it purports to be in the nature of a bill transaction, as well as a pledge of the ship and freight. It is also clear that the lender did not stipulate for what is commonly called maritime interest; but it is also clear that he was running the risk of the vessel not reaching her port of discharge in Europe, unless whilst on her voyage she should put into a port of refuge to repair, in which case the loan was to become at once due and payable, and for the recovery of which the lender was to have power at once to proceed against the ship.

It is said, on the one hand, that this is not a bottomry transaction, but a bill transaction, or a mortgage, as distinguished from a bottomry bond. I have no doubt that those who prepared the document intended that it should be both a bill transaction—as it is in fact described—and a bottomry bond as well—that is, that if, on the arrival of the ship at her port of discharge, a bill at sight or cheque was given, or freight to the amount of the loan was remitted to or held at the disposal of the agents of the lender, then that the ship

(1) (1879) 4 P. D. 210, at p. 211. (2) (1872) L. R. 4 A. & E. 1, at p. 5.

should be free, but if not, then that the ship should be held liable.

It appears, however, from the case of *The Elpis* (1), that a document, if in substance and effect a bottomry bond, is not invalid because it is called something else. There the document was called "this first of exchange"; but Sir Robert Phillimore said: "Now it is clear to me that this is in substance and effect a bottomry bond, and, looking to the precedents in this court, it must be so considered." In that case it is to be observed that there was no maritime interest paid or agreed to be paid by the borrower; but there was a maritime risk, because unless the ship arrived at her port of discharge the loan was lost. That case was followed by *The Cecilie* (2), which was decided by the same learned judge seven years later, and is important on the question of maritime risk, there being no stipulation made for interest. Sir Robert Phillimore said: "I am satisfied that on the authority of precedents and decided cases I must hold that the instruments in respect of which this action is brought are valid bottomry bonds." There, as here, the money was to be paid, not only in the event of the ship's arrival at her port of discharge, but in the event of her putting in at some place between the port of sailing and the port of discharge, which involved a maritime risk, because if she was lost at sea after setting sail, and was never heard of again, the lenders would lose their loan.

On the other hand, "the total absence of any mention of a maritime risk, either express or implied," would invalidate the document as a bottomry bond: see *The Emancipation* (3), and see also *The Indomitable* (4), where it was attempted to make a document a bottomry bond; but the Court held that, as it was impossible to find any intention on the part of the lenders to include a maritime risk, it was not a bottomry security.

That case may also be referred to on another point. In the margin of the document which I have to construe appears this memorandum: "Insured under open policy with . . . . through Brodr. Trier, Copenhagen," who were the agents of the persons

(1) L. R. 4 A. & E. 1.
(2) 4 P. D. 210.
(3) 1 Wm. Rob. 124, at p. 130.
(4) Sw. 446.

1899

THE HAABET.

Bucknill J.

who made the advances to the master of the *Haabet*. Now in *The Indomitable* (1) Dr. Lushington said: "I agree that if there were a maritime risk directly stated, the mere fact that the insurance was to be made by the lenders and paid for by the borrowers might not invalidate the bond." I follow that dictum, and find that, as there was a maritime risk in this case, so the fact of insurance by the lenders—as I suppose it was—does not invalidate the bond.

Remembering that it is the practice of this Court to construe liberally such a document as this, where the parties intended to treat the loan as one of bottomry, and finding as I do that, by the language of the instrument, the lenders incurred a maritime risk, and that neither the bill transaction nor the insurance memorandum invalidate it, I pronounce for the validity of the bond.

Solicitors for J. Fabert & Co.: *Botterell & Roche, for Weightman, Pedder & Weightman, Liverpool.*

Solicitors for bottomry bondholder: *William A. Crump & Son.*

(1) Sw. 446, at p. 452.

T. L. M.

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**DIVORCE**—*Damages—Measure of—Husband and Wife Living Apart—Separation Caused by Wife—Subsequent Adultery.*

Upon a husband's petition for dissolution of marriage claiming damages, it appeared that the husband and wife separated after a cohabitation of only a few months on account of the wife's overbearing and insulting conduct and language towards her husband, culminating in actual violence to him on more than one occasion.

It was proved, and not denied, that, rather more than a year after the separation, the co-respondent, who had been acting as her solicitor, committed adultery with the respondent, and that this improper intimacy continued for about twelve months:—

*Held*, that, notwithstanding the separation and the fact that it had been caused by the violent conduct of the respondent towards the petitioner, the latter was entitled to some damages; that the fact of the co-respondent's frequent adultery having rendered reconciliation absolutely out of the question was a material element for consideration in fixing damages; and, that the jury were entitled to consider also, and to decide as a matter to be inferred from all the circumstances of the case, whether the respondent and co-respondent had not misconducted themselves together at a time anterior to the date proved by affirmative evidence and admitted and alleged by the co-respondent as the first date when adultery took place between himself and the respondent.

*Weedon* v. *Timbrell*, (1793) 5 T. R. 357, and *Malcomson* v. *Givins*, *The Times*, Feb. 27, 1873, considered. EVANS *v.* EVANS AND PLATTS
Jeune Pres. 195

2. —— *Desertion—Desertion without previous Cohabitation.*

There may be desertion without previous cohabitation.

Where a husband and wife separated immediately after their marriage, and never co-habited, but it appeared that it was the husband who refused to co-habit, the wife having been always willing to do so, the Court found that the husband had been guilty of desertion. DE LAUBENQUE *v.* DE LAUBENQUE Jeune Pres. 42

3. —— *Desertion—Husband's Adultery—Refusal to lead Chaste Life—Wife unable to continue Cohabitation.*

In order to constitute desertion, there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other.

It is not always, or necessarily, the guilty party who leaves the matrimonial home: the party who intends to bring the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion.

There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation and does so by leaving his wife, and that of a husband who, with the like intent, obliges his wife to separate from him.

In a case where a husband is carrying on an adulterous intercourse with another woman or other women, although he does not bring the adultress into the matrimonial home and commit adultery with her there, the wife may express her willingness to remain with him on condition that he give up the connection complained of; and, if the husband refuse to do so, and the wife withdraw from cohabitation in consequence of the refusal, the husband is guilty of desertion, as he must be taken to intend the consequences of his action. The situation then produced is just the same as if the guilty husband left his wife. At the end of two years the statutory offence of desertion is complete, and the wife is entitled to relief on that ground. SICKERT *v.* SICKERT - - - Gorell Barnes J. 278

4. —— *Desertion—Husband's Refusal to Discharge Adulterous Servant—Consequent Separation by Wife—Decree.*

Upon a wife's petition for divorce on the ground of desertion and adultery, it appeared that the respondent had refused to break off relations with and to discharge a servant with whom, when taxed, he admitted that he had committed adultery. The petitioner thereupon left the house, and, although overtures were subsequently made by the respondent for a resumption of cohabitation, the petitioner never returned home, owing to the persistent refusal of the respondent to discharge the servant in question:—

*Held*, that the conduct of the husband constituted desertion within the meaning of the Divorce Acts. KOCH *v.* KOCH
Gorell Barnes J. 221

5. —— *Evidence of Marriage—Proof of Marriage between Christians in British India—Indian Act, XV. of* 1872 (*The Indian Christian Marriage Act of* 1872)—*Births' and Deaths' Registration Act*, 1836 (6 & 7 *Will.* 4, *c.* 86), *s.* 38—*List of Registers and Records in the Custody of the Registrar-General at Somerset House.*

The solemnization of a marriage between

**DIVORCE**—*continued.*

Christians in British India is proved by the production of a certificate of the marriage from the India Office. WESTMACOTT *v.* WESTMACOTT
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**6.** —— *Intervention—Co-respondent—Answer containing no Claim for Cross-relief—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 2.

A husband, in his answer to a petition by his wife for dissolution of marriage, made a counter-charge against her of adultery with a specified person, without claiming cross-relief, or "such further or other remedy as the nature of the case may require":—

*Held*, that the Court had no power to allow the alleged adulterer to intervene.

*Wheeler* v. *Wheeler and Rhodes*, (1889) 14 P. D. 154, considered. HARROP *v.* HARROP
**Gorell Barnes J. 61**

**7.** —— *Intervention—Third Party, Application by—Wife's Petition—Husband's Answer—Counter-charge of Adultery — Cross-petition — Jurisdiction — Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 28—*Matrimonial Causes Act*, 1866 (29 & 30 *Vict. c.* 32), *s.* 2—*Appeal to House of Lords—Supreme Court of Judicature Act*, 1881 (44 & 45 *Vict. c.* 68), *s.* 9.

Where a husband in his answer to his wife's petition made a counter-charge against her of adultery with a person named, but did not ask for any relief whatever beyond the simple dismissal of the petition:—

*Held*, by the Court of Appeal, affirming Jeune J., that under the circumstances the answer could not be treated as a cross-petition under s. 2 of the Matrimonial Causes Act, 1866, but merely as an ordinary defence, and that therefore the Court had no jurisdiction, on the opposition of the husband, to allow the alleged adulterer to intervene.

*Harrop* v. *Harrop*, [1899] P. 61, followed.

Application under s. 9 of the Supreme Court of Judicature Act, 1881, for leave to appeal to the House of Lords refused. LOWE *v.* LOWE
**C. A. 204**

**8.** —— *Restitution of Conjugal Rights—Practice—Decree—Service out of Jurisdiction.*

The fact that a decree for restitution of conjugal rights has been served upon a respondent when temporarily resident out of the jurisdiction does not vitiate its effect, if it also appear that the respondent was, for all practical purposes, as capable of complying with the decree, within the time limited therein, as if he had been served in this country. DICKS *v.* DICKS
**Gorell Barnes J. 275**

**9.** —— *Settlements — Variation — Interest of Children—Wife's Power of Appointment to Husband—Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 45—*Matrimonial Causes Act*, 1859 (22 & 23 *Vict. c.* 61), *s.* 5.

By the Matrimonial Causes Act, 1859 (22 & 23 Vict. c. 61), s. 5, "The Court, after a final decree of nullity of marriage or dissolution of marriage, may inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties

**DIVORCE**—*continued.*

whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or a portion of the property settled either for the benefit of the children of the marriage or of their respective parents as to the Court shall seem fit."

The principle of the decisions on the section is that, where the breaking up of the family life has been caused by the fault of the respondent, the Court ought to place the petitioner and the children in a position as nearly as circumstances will permit the same as if the family life had not been broken up.

Where, therefore, a wife, whose marriage had been dissolved on the ground of her adultery, had under her marriage settlement a power of appointment in her husband's favour, if he should survive her, over a fund, which, apart from the exercise of the power, would upon her death have vested in the children of the marriage, and this was the husband's only interest in his wife's property under the settlement, the Court held that, as it was reasonable to suppose that, if the family life had continued, she would have exercised the power in his favour, the income should, after her death, be paid to him during his lifetime.

*Noel* v. *Noel*, (1885) 10 P. D. 179, *Crisp* v. *Crisp*, (1872) L. R. 2 P. & M. 426, *Forsyth* v. *Forsyth*, [1891] P. 363, *Pollard* v. *Pollard*, [1894] P. 172, and *Hipwell* v. *Hipwell*, [1892] P. 147, considered. HARTOPP *v.* HARTOPP AND AKHURST - - - **Gorell Barnes J. 65**

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The Chancellor of the Diocese of London, in the exercise of his judicial discretion, may accept letters of request, signed by the President of the Probate, Divorce, and Admiralty Division, requesting that in aid of the trial of an issue in a probate action a faculty may be granted authorizing the opening of a vault in a consecrated burial ground in the diocese, and the opening and inspection of a coffin there buried, for the purpose of identification, and issue a faculty to give effect to such letters of request.

During the hearing of an opposed cause of faculty instituted for the purpose of obtaining a faculty for the opening of a vault in the con-

**ECCLESIASTICAL LAW**—*continued.*

secrated portion of the North London Cemetery at Highgate, and the opening and inspection of a coffin there buried, the Chancellor, with the consent of all parties, adjourned the case to enable the petitioners to apply to the President of the Probate, Divorce, and Admiralty Division of the High Court of Justice to issue letters of request to the Chancellor to grant a faculty for the above-mentioned purposes in aid of justice, and of an issue in a pending probate action in which one of the petitioners was plaintiff. On the application before the President it appeared that the probate action had been brought for the revocation of the probate of the will and codicil of a testator—a relative of the petitioners—alleged to have been buried in the coffin required to be opened, and, on primâ facie evidence having been given that the testator had been seen alive after the date of the grant of the probate sought to be revoked, the President ordered letters of request to issue. Some evidence to the same effect had also been given in the faculty suit previously to the issue of the letters of request, and it had been proved there that one of the petitioners was registered in the books of the cemetery—a cemetery established under a private Act of Parliament—as the owner of the vault proposed to be opened. The grant of the faculty was opposed by the surviving executor of the testator and by other parties interested under the will, and on their behalf evidence was tendered to the Chancellor to shew that the testator had died before the date of the probate, and had been buried in the coffin proposed to be opened:—

*Held*, that the Court, in the exercise of its discretion, would accept the letters of request, reject the evidence tendered on behalf of the opponents, and decree a faculty to issue according to the tenor of the letters of request:—

*Held*, also, that s. 25 of the Burials Act, 1857, which provides that "except in the cases where a body is removed from one consecrated place of burial to another by faculty granted by the Ordinary it shall not be lawful to remove any body or the remains of any body which may have been interred in any place of burial without licence under the hand of one of Her Majesty's principal Secretaries of State . . . ." did not require that a proviso should be inserted in the faculty that the faculty was granted subject to the licence of one of Her Majesty's principal Secretaries of State.

*Semble*, that the faculty might be lawfully acted upon without any such licence having been obtained. DRUCE *v.* YOUNG

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2. —— *Faculty — Jurisdiction — Erection on Churchyard closed for Burials — Schools and Parish Hall to be used for Mission Services—Disused Burial Grounds Act*, 1884 (47 & 48 *Vict. c.* 72), *s.* 3—*Meaning of "Enlargement of Church, Chapel, Meeting-house, or other Places of Worship."*

The 3rd section of the Disused Burial Grounds Act, 1884, provides that after the passing of that Act it shall not be lawful to erect any buildings upon any disused burial ground (defined by that Act to mean a burial ground in respect of which an Order in Council has been made for the discontinuance of burials therein in pursuance of the Burial Acts, 1852 and 1853), except for the purpose of enlarging a church, chapel, meeting-house, or other places of worship:—

*Held*, that the Ordinary had, without infringing the above section, jurisdiction to authorize by faculty the rebuilding and extension by way of enlargement of schools and a parish hall erected on a disused burial ground within the Act, and which were used for mission services for adults and children, and which it was intended to use when rebuilt for the same purposes supplemental to the services in the parish church, and to meet the growing wants of the parish. VICAR OF ST. JAMES THE LESS, BETHNAL GREEN *v.* PARISHIONERS OF SAME

**Consist. Ct. of London 55**

3. —— *Faculty for Removal of Human Remains and Use of Strip of closed Churchyard for Widening of Public Highway—Joint Petition by Incumbent and Churchwardens and Highway Authority—Practical Necessity for proposed Works—Issue of Faculty to Incumbent and Churchwardens.*

Where it appeared that the widening of a public highway abutting on a churchyard of a parish church would be a benefit both to the congregation attending the church and to the public in general, and that in the opinion of the highway authority—a municipal corporation—it was practically necessary that the widening should be effected by including therein a strip of the churchyard closed for burials by Order in Council, a faculty was granted to the incumbent and churchwardens of the church authorising the removal of human remains interred in the portion of the churchyard required for the widening and the setting back of the churchyard fence so as to throw such portion of the churchyard into the highway on the Ordinary being satisfied that an adequate consideration would be paid by the corporation in return for the rights sanctioned.

The corporation had joined in petitioning for the faculty, but was omitted from the grant, the Ordinary being of opinion that it was preferable that the grant should be made to individuals. VICAR OF ST. NICHOLAS, LEICESTER *v.* LANGTON

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**PRACTICE**—*Service—Foreign Corporation carrying on Business in England—Agent—Admiralty*

**PRACTICE**—*continued.*

*Practice—Jurisdiction—Service of Writ—Clerk—Rules of Supreme Court*, 1883, *Order* IX., *r.* 8.

The defendants, a French company, owners of several lines of steamers, including one trading between French and English ports, and having their principal place of business in Paris, leased and paid the rent of an office in London where applications for freight and passage could be made to the company's agent. They agreed with the agent to be chargeable for income tax, to be liable for legal expenses, and to pay for advertisements, printing, postage, and telegrams; the agent to pay the staff, to bear the cost of heating, lighting, and furnishing the office, and to be remunerated by a guaranteed minimum commission on freight and passage-money. The agent acted for two other companies whose names were exhibited on the windows of the office as well as that of the defendants:—

*Held*, by the Court of Appeal (A. L. Smith and Collins L.JJ.), affirming the decision of the President (Sir F. H. Jeune), that the defendants were carrying on business in this country in such a way as to be resident within the jurisdiction, so that service, by the plaintiffs on the agent at the office in London, of a writ in an Admiralty action in personam for damage by collision on the high seas, was good service on the defendants within the meaning of Order IX., r. 8, of the Rules of the Supreme Court, 1883. LA BOURGOGNE - - - - - - C. A. 1

—— Admiralty. *See* Cases under SHIPPING.

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—— Probate. *See* Cases under PROBATE.

**PROBATE**—*Administration with Will annexed——"Special Circumstances"—Grant to Stranger—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

Where all parties interested in the estate of the deceased had entered into a compromise, with a view to putting an end to all further disputes and litigation, upon the basis that B., a stranger in blood, who had been employed by the deceased in auditing his accounts, should apply for and obtain a grant of letters of administration with the will and codicils annexed, the Court, upon his application, and subject to the consents of all the persons interested in the estate, and subject to an affidavit of the fitness of the proposed administrator being filed, made the grant to him under s. 73. IN THE GOODS OF POTTER. POTTER *v.* POTTER - - Gorell Barnes J. 265

2. —— *Bastardy—Escheated Land—Grant of Administration—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1.

The Land Transfer Act, 1897, does not bind the Crown, and therefore the legal estate in escheated land does not, under s. 1, vest in the Solicitor to the Treasury as the Crown's nominee.

Where a widow died, after the commencement of the Act, without issue, a bastard and intestate, entitled to both real and personal estate, a grant was made by the Court to the Solicitor to the Treasury of administration of her personal estate

**PROBATE**—*continued.*

only, as before the Act. IN THE GOODS OF HARTLEY - - - - Jeune Pres. 40

3. —— *Citation—Grant of Administration—Practice—Document Executed as a Will—Sole Executrix and Beneficiary Cited—Non-appearance—Grant to Next of Kin as upon Intestacy.*

The deceased died leaving a document, which he had duly executed as a will, giving all his property to a certain person and appointing her sole executrix.

Upon proof of personal service upon that person of a citation, calling upon her to bring in the will or to shew cause why administration, as upon intestacy, should not be granted to the applicant as next of kin, and upon an affidavit of non-appearance to the citation:—

The Court, upon the authority of *Crosby* v. *Noton*, (1867) 36 L. J. (P. & M.) 55, and although there was no evidence before it as to the invalidity of the will, made a grant to the applicant, as upon an intestacy, conditionally upon the applicant swearing, when taking the grant, that he was the next of kin of the deceased. IN THE GOODS OF DENNIS - - - Jeune Pres. 191

4. —— *Citation — Necessity for — Disappearance of Person entitled—Grant of Administration.*

Where upon an application by the one surviving brother of an intestate, who died in 1895, for administration of his estate, it appeared that the intestate's father, who, if alive, was entitled to administration, had deserted his wife in 1866 and had not since been heard of, the Court directed that the father should be cited. IN THE GOODS OF HARPER - - Gorell Barnes J. 59

5. —— *Citation and Non-appearance of Alleged Legatees—Practice—Will—Grant of Administration.*

In an action brought to set aside an alleged will, the Court, on proof of the citation and non-appearance of the alleged legatees, made a grant of administration to the next of kin of the deceased.

*Morton* v. *Thorpe*, (1863) 3 Sw. & Tr. 179, followed. IN THE GOODS OF QUICK. QUICK *v.* QUICK - - - Gorell Barnes J. 187

6. —— *Citation dispensed with—Sureties—Justification—Practice—Intestacy—Oath of Administrator—Next of Kin—Grant of Administration—Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73.

The intestate died in 1898. His son, who, if alive, would be entitled to administration as sole next of kin, had married and left this country in 1872, and had not been heard of since. The intestate's estate amounted to about 200*l.* The Court allowed a grandson of the intestate (the issue of a deceased daughter) to take a grant of administration, under s. 73, without requiring the missing next of kin to be cited by advertisements; the applicant to swear that he believed himself to be the sole next of kin, and the sureties to his bond to justify.

*In the Goods of Reed*, (1874) 29 L. T. (N.S.) 932, followed.

*In the Goods of Shoosmith*, [1894] P. 23, distinguished. IN THE GOODS OF CALLICOTT Jeune Pres. 189

**PROBATE**—*continued.*

7. —— *Costs—Liability of Defendant giving Notice under r.* 18 *of Order XXI.—Rules of Supreme Court, Order XXI., r.* 18; *Order LXV., r.* 1.

The general rule, that in cases tried with a jury costs follow the event, as, also, the exception engrafted on this rule by the Probate rule protecting a defendant from being ordered to pay costs where he has duly delivered a notice of his intention to call no witnesses, and merely requiring the will to be proved in solemn form, have been superseded by Order XXI., r. 18, as now amended.

The effect of that rule as amended is that, whether he has asked for a jury or not, a defendant who duly gives notice under the rule is not to be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will. DAVIES *v.* JONES - - - Jeune Pres. 161

8. —— *Costs—Proof in Solemn Form—Notice by Defendant to Cross-examine only—Practice—Order XXI., r.* 18*—Rules of Supreme Court, July*, 1898.

By Order XXI., r. 18, as amended by the Rules of the Supreme Court, July, 1898, "In probate actions the party opposing a will may, with his defence, give notice to the party setting up the will that he merely insists on the will being proved in solemn form of law, and only intends to cross-examine the witnesses produced in support of the will, and he shall thereupon be at liberty to do so, and shall not, in any event, be liable to pay the costs of the other side, unless the judge shall be of opinion that there was no reasonable ground for opposing the will."

The judge, being of opinion that the defendants in a probate action had opposed the will without reasonable ground, ordered them to pay the costs of the other side, under the amended rule. SPICER *v.* SPICER - Jeune Pres. 38

9. —— *Executor — Disappearance of Person named as—Grant of Administration—Will—Court of Probate Act*, 1857 (20 & 21 *Vict. c.* 77), *s.* 73*—Substantial Estate—Grant to one of the Residuary Legatees.*

The executor named in a will took some steps towards obtaining probate, but, after drawing a sum of 25*l.* from the estate on account of costs, appeared to have departed from the country in embarrassed circumstances, leaving no address, and apparently with no intention of returning:—

*Held* (all parties interested under the will consenting), that, although the estate was of substantial value, administration with the will annexed might be granted, upon motion, under s. 73, to one of the persons named as residuary legatees without notice to the executor. IN THE GOODS OF MASSEY - Gorell Barnes J. 270

10. —— *Executors—Appointment of—Will—Executor Described by Wrong Surname.*

The deceased, by his will, appointed certain executors, of whom one was described as "the said Thomas Cooper." The deceased had no friend, child, or relative named Thomas Cooper, but he had a friend named Thomas Stevenson,

who was named in the will as a trustee along with the other two persons properly named as executors.

The Court ordered the surname "Cooper" to be struck out of the engrossment of the will to be made for the purposes of probate, and granted probate to Thomas Stevenson and the other two executors. IN THE GOODS OF COOPER

**Jeune Pres. 193**

**11.** —— *Executors—Powers and Duties—Law of Chili—Evidence—Grant to Widow—Administration with Will annexed.*

A testator died domiciled in Chili, leaving a will, appointing two executors, one of whom died without taking probate. The other was believed to be in Bolivia, but no response had been obtained to repeated applications made to him. The only property in this country of any value consisted of a debt which it was desired to collect.

The Court accepted the affidavit of a notary, who was not a qualified Chilian lawyer, as evidence of the law of Chili; and, upon his evidence that the powers and duties of an executor in that country would only extend to seeing that the estate was duly administered by the acting heiress, who in this case was the testator's widow, the Court made to her a grant of administration, with the will annexed. IN THE GOODS OF WHITELEGG - - **Jeune Pres. 267**

**12.** —— *Limited Administration—Grant Ad Colligendum—Next of Kin Abroad—Necessity for the immediate Sale of a Business.*

Where the keeper of a small shop in London died apparently a bachelor and intestate, and his next of kin who lived in South America had been communicated with but had not yet answered, and it was necessary to sell the goodwill at once, the Court made a grant ad colligendum to a friend, whom the deceased had shortly before his death asked to manage his affairs, in the form adopted in *In the Goods of Schwertfeger*, (1876) 1 P. D. 424. IN THE GOODS OF BOLTON

**Gorell Barnes J. 186**

**13.** —— *Limited Administration, Grant of—Trust Fund.*

The Court will grant letters of administration to the cestui que trust of a trust fund, limited to that fund, after the death of the trustee, on the consent of his personal representatives.

*Pegg* v. *Chamberlain*, (1860) 1 Sw. & Tr. 527, followed. IN THE GOODS OF RATCLIFFE

**Gorell Barnes J. 110**

**14.** —— *Limited or General Grant—Practice—Married Woman—Foreign Domicil—Power of Appointment—Will made in Execution of Power—Administration with Will annexed—Grant to Appointee.*

Upon an application for administration with the will annexed it appeared that the deceased was domiciled in France, her husband, who survived her, being a domiciled Frenchman. The applicant was the appointee in trust under the marriage settlement of the deceased, which, on the face of it, appeared to include all her property, and the ground of the application was that the will had not been executed in accordance with the law of the domicil of the deceased:—

*Held*, that unless the husband of the deceased were to consent, a full grant ought not to be made; and that, in accordance with the practice, failing the husband's consent, the grant to the applicant, as appointee, should be limited to such property as the deceased had power to dispose of, and did dispose of, by the instrument executing the appointment. IN THE GOODS OF TRÉFOND

**Jeune Pres. 247**

**15.** —— *Lost Will—Small Estate—Proof on Motion—Consent of Next of Kin dispensed with—Practice.*

The Court will now, in the case of a small estate, entertain an application to prove, upon motion, the contents of a lost will, without requiring, as an absolute condition, the consent of all persons interested in the estate.

*In the Goods of Pearson*, [1896] P. 289, qualified. IN THE GOODS OF APTED

**Gorell Barnes J. 272**

**16.** —— *Obliteration—Words of Will before Alteration whether "Apparent"—Evidence of Experts in Writing—Practice—Wills Act* (1 *Vict. c.* 26), *s.* 21.

The Court, on motion, allowed words beneath alterations in a will to be substituted, as "apparent" within the meaning of s. 21 of the Wills Act (1 Vict. c. 26), upon proof that they could be deciphered by an expert in handwriting using a magnifying glass. IN THE GOODS OF BRASIER

**Gorell Barnes J. 36**

**17.** —— *Practice—Staying Proceedings—Administration—Laches—Knowledge of Proceedings in Chancery—Subsequent Delay—Order—Suit Dismissed.*

The plaintiff, who had been aware of, and had taken steps in, administration proceedings in the Chancery Division in the year 1894, and who also had knowledge at the time that the claim of parties in those proceedings and her own claim (if any) depended upon the legitimacy or illegitimacy of the mother of the intestate, took no steps until 1898 to prosecute her claim, as the alleged next of kin of the intestate.

On April 21, 1896, an order was made for the balance of the estate to be distributed among the persons who were found, in the Chancery proceedings, to be the next of kin, and all further proceedings therein were stayed; and on June 7, 1898, the writ in the present action was issued by the plaintiff, claiming, as next of kin of the deceased, administration to his estate.

Upon a summons to shew cause why this action should not be dismissed:—

*Held*, that although it was not necessary to determine whether the matter was res judicata, the plaintiff had practically acquiesced in the Chancery proceedings, and had been guilty of such laches as to disentitle her to maintain, against those who had shared the estate under the orders in the Chancery proceedings, a suit to compel them to refund their shares; and, that as the only object of the present suit, which was, in form, to revoke letters of administration granted in 1892 and obtain a grant in her own favour,

**PROBATE**—*continued.*
was to aid her in an attempt to recover the property which had been distributed, this Court ought not to assist her attempt to obtain a grant, which, if obtained, would be useless to her; and, accordingly,
*Held*, that the suit must be dismissed with costs. MOHAN *v.* BROUGHTON
Gorell Barnes J. 211

—— Acceptance of letters of request granted in aid of probate action — Jurisdiction — Faculty - - - - 84
*See* ECCLESIASTICAL LAW. 1.

**PROOF**—In solemn form—Notice by defendant to cross-examine only - - 38
*See* PROBATE. 8.

—— Marriage between Christians in British India—Evidence - - - 183
*See* DIVORCE. 5.

**PUBLIC AUTHORITIES PROTECTION**—Harbour board—Limit of time for commencement of action against a—Costs - 236
*See* SHIPPING. 9.

**RECEIVER**—Of wreck—Salvage—Jurisdiction—Detention of property - - 251
*See* SHIPPING. 14.

**REGISTRY** — Exemption from — Limitation of liability—"Tons burden"—"Tonnage"
*See* SHIPPING. 12. 45

**RESTITUTIO IN INTEGRUM**—Collision—Total loss—Vessel in ballast under charter—Measure of damage - - 165
*See* SHIPPING. 4.

**RESTITUTION OF CONJUGAL RIGHTS**—Practice—Decree—Service out of Jurisdiction
*See* DIVORCE. 8. 275

**RIVER**—Collision—Sunken wreck in navigable river—Liability of owner for negligence of contractor - - - - 74
*See* SHIPPING. 7.

**RULES OF THE SUPREME COURT:—**
—— **Order IX., r. 8**—*Service of Writ of Summons*
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—— **Order XXI., r. 18**—*Defence and Counterclaim* [*as amended July*, 1898, *see W. N.* 1898 (*Sept.* 10), *p.* 315] - 38, 161
*See* PROBATE. 7, 8.

—— **Order LXV., r. 1**—*Costs* - - 161
*See* PROBATE. 7.

**SALVAGE**—Discontinuous services—Agreement — Tender — Authority of master of salving vessel - - - 111
*See* SHIPPING. 13.

—— Jurisdiction—Receiver of wreck—Detention of property - - - - 251
*See* SHIPPING. 14.

**SEAWORTHINESS**—Warranty of—Charterparty—Insufficiency of coal—Cargo burned as fuel - - - - - 140
*See* SHIPPING. 2.

**SERVANT** — Husband's refusal to discharge adulterous servant—Consequent separation by wife—Desertion - - 221
*See* DIVORCE. 4.

**SERVICE**—Foreign corporation carrying on business in England—Jurisdiction - 1
*See* PRACTICE.

—— Out of Jurisdiction—Restitution of conjugal rights—Decree—Practice - 275
*See* DIVORCE. 8.

**SETTLEMENT**—Variation of—Interest of children—Wife's power of appointment to husband - - - - 65
*See* DIVORCE. 9.

**SHIPPING**—*Bottomry — Maritime Risk—Maritime Interest—Personal Credit—Right to Payment at Intermediate Port—Insurance.*
The master of a Norwegian barque at Barbados, being in need of necessaries, obtained a cash advance on the security of an instrument by which he promised to repay the amount "within ten days after arrival at port of discharge in Europe, or at any other place at which the voyage may terminate . . . . in an approved banker's sight draft or cheque on London to the order of (the agents of the lender) . . . . and for which I hereby pledge the said vessel, her freight and her owners. This claim to have priority over all others that may be presented against the said freight and vessel, with the express agreement, however, that it shall not invalidate or affect the lien upon, or right of process against, the said vessel and freight and owners for the amount of this bill . . . . in case of its not being duly accepted and paid. Provided always . . . . that if the said vessel shall, in the course of the voyage on which she is now being despatched, go into any port of refuge to repair there, all the moneys for the payment of which the said vessel, her freight, and owners, are hereby pledged, shall forthwith become due and payable, and it shall be lawful for the said (agents) to proceed at once against the said vessel, freight and owners, or any or either of the same, separately, to recover the amount of this bill. . . ." In the margin was a note as to insurance by the lender:—
*Held*, by Bucknill J., that the instrument was a valid bottomry bond, for the lender of the money ran the risk of the vessel not reaching her port of discharge, and, therefore, it was immaterial that there was no stipulation as to maritime interest, nor was the bond invalidated by the bill transaction contained in it, or by the loan becoming immediately payable on the vessel putting into a port of refuge, or by the memorandum as to insurance. THE HAABET
Bucknill J. 295

2. —— *Charterparty—Warranty of Seaworthiness—Voyage of Steam-vessel in Stages—Insufficiency of Coal—Cargo Burned as Fuel.*
The plaintiffs' steam-vessel left Cebu in the Philippine Islands for Liverpool with cargo belonging to the defendants, shipped under a charterparty and bill of lading giving liberty to coal at ports on the way, and excepting the negligence of the master and engineer. The vessel called at Colombo, but did not take in a

reasonably sufficient quantity of coal for the next stage to Suez, and, when passing Perim (a coaling station), the master did not call there owing to the negligence of the engineer in not informing him that the coal was running short. In consequence, whilst proceeding up the Red Sea 50 tons of cargo were burned as fuel in order to carry the vessel on to Suez where she again coaled, and so was enabled to perform the chartered voyage to Liverpool. In an action for balance of freight:—

*Held*, by the Court of Appeal (Lord Russell of Killowen C.J., A. L. Smith and Collins L.JJ.), affirming the decision of Gorell Barnes J., that the defendants were entitled to set off by way of counter-claim the value of the cargo burned against the freight, on the ground that, if the plaintiff shipowners, owing to the necessity for coaling, availed themselves of the liberty to call at ports on the way, they must make their vessel seaworthy at the commencement of each stage for the voyage or stage of the voyage she then enters upon, and, in the circumstances of this case, the second stage was from Colombo to Suez. The plaintiffs, therefore, could not rely on the exception covering negligence of the engineer when off Perim, as by the insufficiency of coal when the vessel left Colombo the implied warranty of seaworthiness had been broken.

*Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*, (1870) L. R. 3 P. C. 234, and *Thin* v. *Richards*, [1892] 2 Q. B. 141, followed.
THE VORTIGERN - - - C. A. 140

3. —— *Collision—Action in Rem—Arrest—Bail—Release—Judgment—Unpaid Balance of Damages—Practice—Admiralty Court Act*, 1861 (24 *Vict. c.* 10), *s.* 15—*Writ of Fieri Facias.*

A collision occurred in the river Thames between a British and a foreign vessel. The owners of the British vessel commenced an action in rem and arrested the foreign vessel, the owners of which, domiciled abroad, appeared, and, having put in bail for the full value of the vessel and her freight, she was released. The foreign vessel was subsequently found alone to blame, and the decree in the usual form, in the case of owners who have appeared, condemned the defendants and their bail in damages and costs. The damages proved to be in excess of the amount of the bail, and the plaintiffs, in respect of this balance, sued out a writ of fieri facias under which the foreign vessel was seized. On application to the Court the sheriff was ordered to withdraw:—

*Held*, by the Court of Appeal (A. L. Smith and Vaughan Williams L.JJ.), reversing the decision of Bucknill J., that the owners of the foreign vessel had, by appearing, rendered themselves personally liable, and, therefore, payment of the balance could be enforced under s. 15 of 24 Vict. c. 10, by a writ of fieri facias against any of their goods and chattels, including the released vessel, within the jurisdiction.

*The Dictator*, [1892] P. 304, held applicable, approved, and followed. THE GEMMA C. A. 285

4. —— *Collision — Damage — Measure of — Practice—Total Loss—Vessel in Ballast under Charter—Restitutio in Integrum.*

The plaintiffs' barque, whilst proceeding in ballast from London to a North American port under charter to load a cargo for the Continent, came into collision with the defendants' steamer and was totally lost.

The defendants admitted liability, and, on the reference to assess the damages, the registrar, assisted by merchants, allowed a sum representing the value of the plaintiffs' barque at the date when she would have accomplished the homeward voyage, together with a sum for the loss of the profit which would have been realized under the charter.

On motion in objection to the report on the ground that, in the case of the total, as distinguished from the partial, loss of a vessel without cargo, the plaintiffs were only entitled to the market value of the vessel at the time of her loss:—

*Held*, by Sir F. H. Jeune P., confirming the report of the registrar, that the proper measure of damage was the value of the vessel at the end of the voyage, plus the profits lost under the charterparty.

*The Columbus*, (1849) 3 Wm. Rob. 158, and *The Clyde*, (1856) Sw. 23, considered. THE KATE Jeune Pres. 165

5. —— *Collision—Damages—Loss of Use of Lightship—Hire of Substitute.*

The plaintiffs, the Mersey Docks and Harbour Board, are by statute charged with the duty of lighting the approaches to the river Mersey, and, as there are four stations to be lighted, they own six lightships, four always in use, a fifth to replace the lightships as they are brought in, one at a time, for overhaul, and a sixth kept moored in the river Mersey in readiness for special emergencies to take the place of any one of the lightships which may be damaged.

One of the lightships was damaged by collision with a steamship owned by the defendants, who admitted liability, and, on the reference to assess the damages, all the out-of-pocket expenses were agreed to, consisting of the cost of raising and repairing the lightship and of supplying her place, together with the claims of the master and crew for their clothing and effects; but, on appeal to the Admiralty Division from the Liverpool District Registrar, a claim of 310*l.* 16*s.* for seventy-four days' loss of the use of the lightship, or hire of the services of the substituted lightship, was disallowed:—

*Held*, by the Court of Appeal (A. L. Smith and Collins L.JJ.), reversing the decision of Phillimore J., that the plaintiffs were entitled to substantial damages for the loss of the use of the lightship; and, therefore, the claim must be allowed.

*The Greta Holme*, [1897] A. C. 596, held applicable and followed. THE MEDIANA. C. A. 127

6. —— *Collision—Second Anchor Light—"At or near the stern"—Regulations for Preventing Collisions at Sea*, 1897, *art.* 11.

The plaintiffs' steamship, 455 feet long, with two masts, was at anchor at night in the river Elbe, athwart the channel, slowly swinging to the first of the flood with her starboard side up

river. She had two anchor lights up, the one aft hanging inside the foreshroud of the port main rigging, 120 feet from the stern.

The defendants' steamship coming down the river did not see the after light until too late to avoid a collision, and struck the plaintiffs' vessel on her starboard side between the forward and after lights. By art. 11 of the Regulations for Preventing Collisions at Sea, the second light is to be carried "at or near the stern":—

*Held*, by the Court of Appeal (A. L. Smith, Vaughan Williams and Romer L.JJ.), affirming the decision of Bucknill J., that the plaintiffs' vessel was to blame, as the position of the light aft was a breach of the statutory rule, and the plaintiffs had failed to prove that the infringement could not possibly have contributed to the collision; but varying the decision by finding the defendants' vessel also to blame for defective look-out, as the position of the light was such that those in charge of her might have seen it sooner. THE GANNET - - C. A. 230

7. —— *Collision—Sunken Wreck in navigable River — Liability of Owner for Negligence of Contractor.*

A dumb barge belonging to the defendants, without negligence on their part or that of their servants, was sunk in the fairway of the river Thames. They employed a proper person to conduct the salvage operations necessary to raise her, and, for that purpose, placed him in possession and control, but, owing to the guard-vessel placed by him to mark the submerged barge having been negligently allowed to get out of position, the plaintiff's steamship coming up the river, without negligence, ran upon the wreck and sustained damage:—

*Held*, by Gorell Barnes J., that the defendants were personally liable, as they had a duty to perform, namely, to use reasonable care to warn other vessels of the position of the wreck, and could not escape from the responsibility attaching to them by delegating the discharge of the duty to a contractor.

*Hardaker* v. *Idle District Council*, [1896] 1 Q. B. 335, followed. THE SNARK.

Gorell Barnes J. 74

8. —— *Collision—Vessel Aground in Thames in Daytime—Thames By-laws*, 1898, *art.* 40—*Regulations for Preventing Collisions at Sea*, 1897, *art.* 4 (*a*).

The plaintiffs' steamship, whilst proceeding up the Thames in the daytime, took the ground in Limehouse Reach and remained fast. In accordance with art. 40 of the Thames By-laws, those in charge of her gave "four blasts of the steam whistle in rapid succession" to indicate that the vessel was "not under command." The defendants, the owners of a steamship, which was following her, and ran into her, alleged that those in charge of the plaintiffs' steamship ought to have hoisted two black balls in accordance with art. 4 (*a*) of the Regulations for Preventing Collisions at Sea:—

*Held*, by Gorell Barnes J., that—assuming, without deciding, that the Regulations for Preventing Collisions at Sea apply in the



Thames, as being tidal waters, connected with the high seas, navigable by sea-going vessels—art. 4 (*a*) of those regulations was not applicable, because that article only provides for the exhibition of black balls by vessels not under command whilst afloat; and, secondly, because, if that article did apply to a vessel fast aground, the case was provided for by art. 40 of the Thames rules, and the sea regulations only come in where they are not excluded by express provision in, or the general scope of, the river rules. THE CARLOTTA - - - Gorell Barnes J. 223

9. —— *Harbour Board—Action against a—Limit of Time for Commencement of—Damages — Practice — Public Duty — Costs — Public Authorities Protection Act*, 1893 (56 & 57 *Vict. c.* 61), *s.* 1.

By the Ribble Navigation and Preston Dock Act, 1883 (46 & 47 Vict. c. cxv.), the defendants, the mayor, aldermen, and burgesses of the borough of Preston, are constituted the port and harbour authority for the port and harbour of Preston.

By the Public Authorities Protection Act, which was passed on December 5, 1893, and came into force on January 1, 1894, an action against any person, in respect of any alleged neglect or default in the execution of any Act of Parliament or of any public duty or authority, must be commenced within six months next after the act, neglect, or default complained of.

The plaintiffs, owners of a barque, issued a writ, on November 14, 1898, in an Admiralty action, against the defendants for damages sustained by the grounding of their vessel on September 13, 1893, in the river Ribble within the port and harbour of Preston, through the alleged negligence of the defendants. The President (Sir F. H. Jeune) dismissed the action with costs to be taxed as between solicitor and client:—

*Held*, by the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.), affirming the decision of the President, that the defendants were acting in pursuance of their public duties, so that s. 1 of the Public Authorities Protection Act, 1893, applied, and that statute, dealing with procedure only, was retrospective, so that the action was barred after the expiration of six months from the default complained of. THE YDUN - - - - C. A. 236

10. —— *Pilotage — Compulsory Pilotage—Liability of Owner—Dutch Law—Collision in the river Scheldt.*

A collision occurred off Flushing at the mouth of the river Scheldt, between a British and a Dutch steamship. In an action by the owners of the former, the owners of the latter pleaded, inter alia, that their vessel was at the time in charge of a Dutch pilot by compulsion of law, and that the negligence, if any, was solely that of the pilot.

The Court found that the collision was due to the negligent navigation of the Dutch vessel, and, after evidence had been given as to the Dutch law on the question of compulsory pilotage:—

*Held*, by Gorell Barnes J., that, though the

**SHIPPING**—*continued.*

employment of the pilot was compulsory, the pilot acted as the adviser of the master who remained in charge, and, therefore, the owners of the Dutch vessel were liable for the damages sustained by the owners of the British vessel. THE PRINS HENDRIK - Gorell Barnes J. 177

11. —— *Pilotage — Compulsory Pilotage — Trinity House Outport District—Coasting Trade —Trading from Port in Great Britain to Port North and East of Brest—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 622, *sub-s.* 1; *s.* 625, *sub-ss.* 1, 3.

By s. 622, sub-s. 1, of the Merchant Shipping Act, 1894, pilotage is compulsory within the Trinity House outport districts.

By s. 625, ships, when not carrying passengers, are exempted from compulsory pilotage in the Trinity House outport districts if (sub-s. 1) employed in the coasting trade of the United Kingdom, or (sub-s. 3) trading from any port in Great Britain within . . . . any of the Trinity House outport districts to . . . . any port in Europe north and east of Brest.

A British ship, without passengers, left Gaza in Asiatic Turkey with a cargo of barley, part of which was to be delivered at the port of Ipswich (a Trinity House outport district), and the remainder at the port of Leith in Scotland. She discharged at Ipswich the portion of cargo to be there delivered, and was proceeding down the river Orwell, within the limits of the port of Ipswich, on her voyage to Leith, when a collision occurred, for which her owners would be responsible if she was not compulsorily in charge of the Trinity House pilot on board:—

*Held*, by Sir F. H. Jeune P., that pilotage was compulsory, as the vessel was not at the time either employed in the coasting trade within the meaning of sub-s. 1, or trading from a port in Great Britain to a port in Europe north and east of Brest within the meaning of sub-s. 3 of s. 625 of the Merchant Shipping Act, 1894.

*The Winestead*, [1895] P. 170, followed. THE GLANYSTWYTH - - - Jeune Pres. 118

12. —— *Limitation of Liability—Exemption from Registry—"Tons burden"—"Tonnage"—Crew Space — Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *s.* 3, *sub-s.* 1; *s.* 503, *sub-s.* 2 (*a*).

By s. 3, sub-s. 1, of the Merchant Shipping Act, 1894, ships not exceeding fifteen "tons burden" employed solely in navigation on the rivers or coasts of the United Kingdom, are exempted from registry. By s. 503, sub-s. 2 (*a*), the owners of a steamship shall not, where, without their actual fault or privity, any loss or damage is caused to any other vessel, by reason of the improper navigation of their steamship, be liable to damages beyond 8*l.* for each ton of the "gross tonnage" of the steamship without deduction on account of engine-room, but deducting the space "certified" under the Act to be occupied by seamen:—

*Held*, by Gorell Barnes J., first, that, under s. 3, a small tug—solely employed in the manner mentioned in the section—of the "gross tonnage," if measured in accordance with the Act, of 35·99 tons, was exempted from registry as, after deducting 17·80 tons for engine-room space, and 6·73 tons for crew space, she did not exceed fifteen "tons burden" within the meaning of the Act, although her weight-carrying capacity in her cargo spaces, with a sufficient freeboard, would exceed that tonnage.

Secondly, that as the vessel was properly exempted from registry, her owners were entitled, under s. 503, to limit their liability to 8*l.* for each ton of her "gross tonnage," ascertained by measuring her according to the Act; but, the crew space not being "certified" as required by the section, that space could not be deducted. THE BRUNEL - - Gorell Barnes J. 45

13. —— *Salvage—Discontinuous Services—Agreement—Tender—Authority of Master of Salving Vessel.*

Where the services of a salvor were discontinuous, and an amount was tendered and paid into court representing the sums agreed upon, by the master of the salving vessel, with the master of the salved vessel, as the reward to cover valuable services rendered prior to the agreement, as well as the successful services subsequently rendered:—

*Held*, by Phillimore J., that the tender must be rejected, and a salvage award made in respect of the services prior to the agreement, as the owner and crew of the salving vessel had acquired vested rights which the master of the salving vessel had no authority to bargain away, but that the amount fixed by the agreement must stand in respect of the subsequent services. THE INCHMAREE - - Phillimore J. 111

14. —— *Salvage—Jurisdiction—Receiver of Wreck—Detention of Property—Merchant Shipping Act*, 1894 (57 & 58 *Vict. c.* 60), *ss.* 546, 552.

By s. 546 of the Merchant Shipping Act, 1894, "Where any vessel is . . . . in distress at any place on or near the coasts of the United Kingdom . . . . and services are rendered by any person in assisting that vessel . . . . there shall be payable to the salvor by the owner of the vessel . . . . a reasonable amount of salvage to be determined in case of dispute in manner hereinafter mentioned."

By s. 552, "Where salvage is due to any person under this Act, the receiver shall—(*a*) if the salvage is due in respect of services rendered in assisting any vessel or in saving life therefrom . . . . detain the vessel . . . . until payment is made for salvage or process is issued . . . ."

A British steamship, belonging to the plaintiffs, with cargo from and to a Continental port, was in the English Chanuel, in distress, for want of fuel, twenty miles off the coast. A British steam-tug towed her into Plymouth, and at the request of the master of the tug, the defendant, receiver of wreck at that port, detained the plaintiffs' vessel two days pending the production of satisfactory bail to answer a claim for salvage.

In an action for damages for the illegal detention of the vessel:—

*Held*, by the Court of Appeal (A. L. Smith, Vaughan Williams, and Romer L.JJ.), affirming the decision of Gorell Barnes J., [1898] P. 206,

**SHIPPING**—*continued.*
that the defendant was entitled to judgment in his favour, for the words in s. 552, "salvage .... due under this Act," mean "salvage recoverable under this Act," and are not limited by s. 546 in respect of the place where the vessel was in distress; so that a dispute as to salvage having arisen, to be determined by a court recognised by the Act, the defendant, as receiver, had jurisdiction to detain the property which was in his district, and liable for salvage.
*Per* Gorell Barnes J. *Semble*, that the words "near the coasts of the United Kingdom" in s. 546 are restricted to the territorial limit. THE FULHAM - - - - - C. A. 251

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